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Published by
BUTTERWORTH & CO. (Publishers) LTD.

Previous volumes published under the title:

ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES

1919 to 1922 45s. net. 1923 and 1924 42s. net.
Editors: Sir John Fischer Williams, C.B.E., K.C., and H. Lauterpacht, LL.D.
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Editors: Arnold D. McNair, C.B.E., LL.D., and H. Lauterpacht, LL.D.
1929 and 1930 42s. net.
Editor: H. Lauterpacht, LL.D.
(*These five volumes are out of print*)
Published by
LONGMANS, GREEN & CO., LTD.

1931 and 1932 50s. net. 1933 and 1934 50s. net.
1935 to 1937 60s. net. 1938 to 1940 70s. net.
1941 and 1942 70s. net.
1919 to 1942 (Supplementary Volume). 70s. net.
1943 to 1945 70s. net. 1946 70s. net.
1947 70s. net. 1948 70s. net. 1949 70s. net.
Editor: H. Lauterpacht, Q.C., LL.D., F.B.A.
Published by:
BUTTERWORTH & CO. (Publishers) Ltd.

AFRICA: BUTTERWORTH & CO. (AFRICA) Ltd.
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WELLINGTON: 49/51 Ballance Street
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INTERNATIONAL LAW REPORTS

YEAR 1956

EDITED
BY
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LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.
1960

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THE INTERNATIONAL LAW REPORTS
1960

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Printed in Great Britain by R. J. Acford Ltd., Chichester, Sussex

PREFACE

THIS volume, like some of its predecessors, contains a number of cases decided in years other than that nominally covered by the volume. This is so largely for the reason that with the passage of time certain reports become accessible which were not available at the time of the composition of the relevant volume. Thus, in this volume, there are included a number of cases from Burma which have only recently come to hand. They have been prepared by Professor Alexandrowicz, who has willingly undertaken to add in this way to the task which he has been so successfully accomplishing in respect of cases from India. There is also some prospect that reports may soon be made available from a number of neighbouring countries.

After consulting the Advisory Committee and others I have decided to include the lengthy arbitral award in the case of *The Alsing Trading Company, Ltd., and the Swedish Match Company* v. *The Greek State.* While that case is not primarily concerned with matters ordinarily falling within the orbit of public international law, it bears on a subject which is becoming of increasing legal and economic importance in the international sphere, namely, contractual relations between sovereign States and foreign commercial enterprises. It is of relevance, in particular, to such matters as the rôle of general principles of law and the relation of State sovereignty to contracts to which the State is a party. At the same time, some parts of the Award cover matters which have, in all probability, little interest for the international lawyer. It has been possible to omit those passages without in any way interfering with the unity of the Award. Original copies of the Award have been deposited in the Library of the Peace Palace at The Hague and in the Squire Law Library at Cambridge University. I am indebted to Professor S. M. Schwebel, an indefatigable helper in every way, for his assistance in procuring the Award, and to the Bataafse International Petroleum Maatschappij N.V. for providing an English translation.

Once again, I should like to express the gratitude of the Advisory Committee and myself to The Ford Foundation and also to the International Law Fund for the grants which they have made in aid of these *Reports.* Without them, it would have been impossible to develop the scope and character of the *International Law Reports* to their present extent.

As in the past, I have relied heavily in matters both of policy and of detail upon the help of Lord McNair, Chairman of the Advisory Committee.

I am greatly indebted to Professor Alona E. Evans who, in addition to her usual devoted assistance, has made it possible to include in the present volume the important decision of the Supreme Court of Chile in the *Lauritzen Case*, which contains a thorough exposition of the subject of angary. Professor Evans undertook personally the onerous task of translating the report into English.

Professor R. R. Baxter, in addition to having undertaken what is usually perhaps the heaviest task in connection with these volumes, namely, the preparation of reports of decisions given by courts of the United States, has given unstinting aid in various other ways. I wish to express to him my deep gratitude.

I am much indebted to Mr. A. B. Lyons for the considerable labour which he has expended in reporting the long and important Award in the *Lighthouses Arbitration* between France and Greece given by an arbitral tribunal under the auspices of the Permanent Court of Arbitration and under the chairmanship of Professor J. H. W. Verzijl. While, ordinarily, cases reported in these volumes are reproduced in their original form, the length and the diversity of subjects covered by this Award made it desirable to reproduce the various parts of the Award in the appropriate sections of the volume. I am also grateful to Mr. Lyons for his assistance with regard to other international cases. He has also helped me by preparing the Index.

Dr. F. Honig has continued to bear the heavy burden of contributing and translating reports from Germany and Austria, and of translating the reports from France and Italy. The care and discretion which he has bestowed on this task are warmly appreciated.

I am also indebted to Mr. E. Lauterpacht for drawing my attention to a number of judgments and awards and for his assistance in the later stages of the preparation of the volume.

Mrs. Gladys Lyons, B.Sc. (Econ.), has continued her close co-operation by rendering editorial assistance. I am grateful to her for all the devotion which she has shown to the *International Law Reports* since the inception of the series.

I wish also to thank warmly Mrs. E. E. Jansen for her help in rendering secretarial assistance and for preparing the Tables of Cases.

I am indebted to Messrs. Butterworth & Co. and their printers and compositors for their courteous and efficient co-operation.

H. LAUTERPACHT

THE PEACE PALACE,
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LIST OF ABBREVIATIONS

OF TITLES OF COLLECTIONS OF DECISIONS, LAW REPORTS, PERIODICALS, ETC., QUOTED IN THE TEXT

A.I.R. =The All India Reporter
All E.R. =The All England Law Reports
A.L.R. =American Law Reports
A.M.C. =American Maritime Cases
App. D.C. =Reports of the United States Court of Appeals for the District of Columbia Circuit
App. Div. =Reports of Cases decided in the Appellate Division of the Supreme Court of the State of New York
Avi. =Aviation Cases (United States)
B.G.E. =Entscheidungen des Bundesgrichts (Switzerland)
BGH St. =Entscheidungen des Bundesgerichtshofes in Strafsachen (Germany)
BGHZ =Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)
B Verw. GE =Amtliche Entscheidungssammlung des Bundesverwaltungsgerichts (Germany)
C.C.P.A. =United States Court of Customs and Patent Appeals Reports
Ch. (or Ch.D.) =Chancery Division of the English High Court of Justice
C.M.R. =Court-Martial Reports (United States)
Cong. Rec. =Congressional Record (United States)
Ct. Cl. =Court of Claims Reports (United States)
D.L.R. =Dominion Law Reports (Canada)
F. 2d =Federal Reporter, Second Series (United States)
Fed. =Federal Reporter (United States)
Fed. Reg. =Federal Register (United States)
F.Supp. =Federal Supplement (United States)
I.C.J. Reports =International Court of Justice: Reports of Judgments, Advisory Opinions and Orders
J.B. =Juristische Blätter (Austria)
L.Ed. =United States Supreme Court Reports, Lawyers' Edition
Ll.L.Rep. =Lloyd's List Law Reports (England)
L.R. =Law Reports (England)
N.E. 2d =North Eastern Reporter, Second Series (United States)
NJW =Neue Juristische Wochenschrift (Germany)
N.Y. Supp. =New York Supplement
N.Y.S. 2d =New York Supplement, Second Series
Ob. =Oberster Gerichtshof (Austria)
ÖR =Österreichische Richterzeitung

Protocole des Séances, etc. (Affaire des Phares) . =Protocoles des Séances, Ordonnances de Procédure et Sentences avec Annexes du Tribunal d'Arbitrage constitué en vertu du Compromis signé à Paris le 15 juillet 1931 entre la France et la Grèce

Q.B. (or Q.B.D.) =Queen's Bench Division of the English High Court of Justice

Rt. =Norsk Rettstidende

Stat. =United States Statutes at Large

Sup.Ct. =Supreme Court Reporter (United States)

T.C. =Reports of the Tax Court of the United States

T.I.A.S. =Treaties and Other International Acts Series (United States)

U.S. =United States Reports

U.S. & C. Av. R. =United States and Canadian Aviation Reports

U.S.C.[A.] =United States Code [Annotated]

U.S.C.M.A. =Decisions of the United States Court of Military Appeals

U.S.T. =United States Treaties and Other International Agreements Series

VfGH =Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofs, New Series (Austria)

Vw GH =Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes, New Series (Austria)

CLASSIFICATION

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- I. NATURE AND BINDING FORCE.
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- IV. RELATION TO MUNICIPAL LAW. *See also* PART VIII, TREATIES: IX, Operation and Enforcement of Treaties, Necessity for Municipal Legislation; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.
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[*See also* PART X, DISPUTES: A, I, ii, Arbitration ; The Law Applied by Arbitral Tribunals.]

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See p. 708 (*Lauritzen et Al.* v. *Government of Chile*), at p. 728.

IV.—Relation to Municipal Law

[*See also* PART VIII, TREATIES: IX, Operation and Enforcement of Treaties, Necessity for Municipal Legislation; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

International Law—Relation to Municipal Law—Duty under Municipal Law Allegedly Incompatible with International Law—Right of Individual to Disobey Municipal Law—Tax Allegedly Levied to Wage Aggressive War—War Crimes—The Law of the United States of America.

FARMER *ET AL. v.* ROUNTREE.

United States, District Court, Middle District, Tennessee.

October 17, 1956.

THE FACTS.—One of the plaintiffs brought an action against the Director, Internal Revenue Service, under the Declaratory Judgment Act (62 Stat. 964, 28 U.S.C. §§ 2201, 2202), to assert immunity from a substantial part of the United States income tax assessed against him for the year 1949 and to enjoin collection of the tax. Another sought recovery of his 1949 taxes already paid.

The plaintiffs alleged that the United States had followed a policy of aggression and military domination since the Second World War. This policy, they contended, violated international law. International law, being paramount to the municipal law of the United States, created a right and a duty in them as individuals to refuse payment of taxes appropriated to effectuate such a policy. If they paid the taxes, they would be punishable under international law as war criminals. In order to support their allegations, the plaintiffs submitted 1,300 requests for admission of facts to the Government and sought to examine many witnesses, including a former President.

The defendant moved for judgment on the pleadings contending that, as a matter of municipal law, the Court was without jurisdiction to entertain or adjudicate on the claims of the taxpayers and that their claims were in any event groundless.

Held: that the motion for judgment on the pleadings must be granted. The foreign policy of the United States was within the exclusive province of the legislative and executive branches of government and could not be reviewed by the judiciary. No rule of international law existed which relieved taxpayers of liability for taxes or imposed criminal responsibility for their payment. In any event, such a rule would not be enforced in the Courts of the United States to interfere with the functions reserved to other branches of government.

The Court said: " The stated purpose of the proposed proof is to show that the military and foreign policies of the United States since World War II, including the prosecution of the Korean War, were designed and carried out not for the purpose of defense or the protection of the proper interests of the United States, but for the purpose of aggrandizement and to impose military domination by the United States throughout the world. It is argued that such alleged activities on the part of the Federal Government are in violation of international law and are therefore illegal and void. Once these alleged facts are established, so the taxpayers argue, they have the right as individuals under principles of international law to refuse payment of two-thirds of their income taxes for the reason that the federal revenue in that proportion has been illegally appropriated by Congress to the preparation for and waging of aggressive war, and the remaining one-third to the legal and constitutional functions of government. They contend, in short, that international law overrides the internal laws of the United States and extends to them as individual citizens not only the right but the duty to refuse to participate in the so-called aggressive military activities of the country, and hence the right to refuse payment of taxes appropriated for those purposes. Otherwise, it is argued that they would be guilty as war criminals under international law and punishable as such. . . .

" The foreign policy of the United States is the exclusive province of the executive and the legislative branches of government, and in this area of responsibility, as well as in all questions of national defense, it is imperative that courts strictly observe the limitations upon their power and refrain from rendering any judgment which would embarrass the policy decisions of government or involve them in confusion and uncertainty. . . .

" Aside from the Court's lack of jurisdiction to adjudicate facts essential to the taxpayers' case, there are still other fatal objections to the claims. In the first place, the Court does not agree that there exists a principle of international law operating to relieve citizens from their tax obligations and liabilities under the local laws of their country, or imposing upon them individual responsibility for the use made of tax revenue. No precedent for such a view has been cited and it finds no support in the language or purpose of any international engagement to which this country is a party. The Nuremberg Judgment was based upon altogether different facts and does not support the theories of immunity here advanced.

" Secondly, if the principle could be discovered, it could not be enforced so as to interfere with or impair the exclusive and non-delegable powers of the executive and legislative departments with respect to the foreign and military policies of the nation. The treaty-making power ' [does not] extend so far as to authorize what the constitution forbids '. *De Geofroy* v. *Riggs*, 133 U.S. 258, 10 S.Ct. 295, 297, 33 L.Ed. 642, 645; *Asakura* v. *City of Seattle*, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041, 1044.[1]

" Many other reasons suggest themselves why the claims cannot prevail, but the reasons indicated are fundamental and are dispositive of all of the issues. . . ."

[Report: 149 F. Supp. 327.]

International Law—Relation to Municipal Law—Operation of Treaties—Peace Treaty with Austria of May 15, 1955—Effect on Rights of Individuals.

See p. 469 (*Execution of Judgment* (*Austrian Peace Treaty*) *Case*).

International Law—Relation to Municipal Law—European Human Rights Convention, 1950—As Affecting Municipal Law on Treatment of Aliens—The Law of Germany.

See p. 393 (*Expulsion of Alien* (*Germany*) *Case*).

International Law—Relation to Municipal Law—National Constitution and Measures Against Property of Enemy Aliens in Conformity with International Engagements—The Law of Costa Rica.

See p. 701 (*Compañia Farbenfabriken Bayer, Soc. por Acciones* v. *Sterling Products International, Inc.*).

International Law—Relation to Municipal Law—Right in International Law to Extend Jurisdiction beyond Low-water Mark—Necessity for Municipal Legislation—The Law of Canada.

See p. 154 (*Gavin et Al.* v. *The Queen*).

[[1] See *Annual Digest*, 1923–1924, Case No. 182.]

International Law—Relation to Municipal Law—The Law of Switzerland.

See p. 195 (*Kingdom of Greece* v. *Julius Bär & Co.*).

International Law—Relation to Municipal Law—Treaty Inconsistent with Subsequently Enacted Statute—" Treaty Merchants " —Admission for Permanent Residence—Eligibility for Naturalization under Subsequently Enacted Statute—The Law of the United States of America.

See p. 453 (*Hing Lowe* v. *United States*).

International Law—Relation to Municipal Law—Whether Treaty of Peace Confers Rights on Individuals.

See p. 687 (*Public Trustee* v. *Chartered Bank of India, Australia and China*), at p. 698.

International Law—Relation to Municipal Law—Private Contracts Inconsistent with Treaty Provisions—Validity of, Under Municipal Law—Exchange Regulations—Bretton Woods Agreements.

See p. 581 (*Southwestern Shipping Corporation* v. *The National City Bank of New York*).

International Law and Municipal Law—Incorporation of International Law in Municipal Law as Consequence of Independence —The Law of Israel.

See p. 284 (*Stampfer* v. *Attorney-General*), at p. 289.

International Law—Relation to Municipal Law—Non-Self-executing Treaty—Necessity for Municipal Legislation—Whether Treaty Creates Obligations for Individuals.

See p. 455 (*United States* v. *Ekenstam et Al.*).

International Law—Relation to Municipal Law—Refugees Convention of July 28, 1951—German Law of April 25, 1951, concerning " Homeless Aliens "—Reference to Convention in Interpretation of German Law.

See p. 386 (*Yugoslav Refugee (Germany) Case*).

International Law—Relation to Municipal Law—Effect of Treaties which have not been made part of Municipal Law—Jay Treaty, 1794—The Law of Canada.

See p. 459 (*Francis* v. *The Queen*).

International Law—Relation to Municipal Law—" Matters Arising Directly under Any Treaty "—Interpretation of Municipal Law Arising Out of a Treaty—Treaty as Actual Object of Interpretation —The Law of Australia.

See p. 477 (*Bluett* v. *Fadden*).

PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

I.—The Beginning of State Existence

[For Recognition *see below,* D.]

States—Establishment of—India—Former Indian States.

See p. 101 (*Gajjan Singh* v. *Union of India and Others*).

States—Establishment of—Conferment of Independence by Occupying Power—Purported Conferment of Independence on Burma by Japanese Occupation Authorities.

See p. 787 (*Chettiar* v. *Chettiar*).

II.—Sovereignty and Independence

iii.—Conduct of Foreign Relations. Conclusiveness of Statements of the Executive

Conclusiveness of Determination by Executive Department—Limits of—Determination of Property Rights—The Law of the United States of America.

See p. 16 (*Smiths America Corporation et Al.* v. *Bendix Aviation Corporation*).

v.—Miscellaneous

Sovereignty and Independence of States—Purported Grant of Independence by Occupant to Occupied Territory—Japanese Occupation of Burma.

See p. 787 (*Chettiar* v. *Chettiar*).

III.—Equality of States

Equality of States—Salaries of Officials of the United Nations—Resolutions of the General Assembly—Staff Assessment Plan—Resulting Inequality Among Member States—Lack of Competence of Tribunal to Impose Resulting Burden Upon United Nations.

See p. 625 (*Harris et Al.* v. *Secretary-General of the United Nations*).

IV.—Recognition of Acts of Foreign States and Governments

[*See also below,* D, Recognition of States, Governments, Belligerency; *and* PART IV, JURISDICTION: I, TERRITORIAL.]

Recognition of Acts of Foreign States—Foreign Confiscatory Legislation—Extraterritorial Effect of—Proof of Nationalization—Establishment of Receivership over Assets of Nationalized Company—The Law of the United States of America.

STEPHEN *ET AL. v.* ZIVNOSTENKA BANKA, NATIONAL CORPORATION.

United States, Supreme Court of New York, Special Term, New York County.

June 27, 1956.

THE FACTS.—Previous proceedings in this case are reported in *International Law Reports*, 1955, p. 719.

This was an action by creditors of the defendant Bank for the appointment of a permanent receiver of the defendant's assets within the State of New York on the ground that the defendant was nationalized within the meaning of section 977–(b) (1) of the New York Civil Practice Act. That provision of law authorizes the appointment of a receiver if a foreign corporation having assets in New York is " dissolved, liquidated or nationalized ". Only the question of nationalization had been left open by the previous proceedings.

The plaintiffs relied on a Law of the Czechoslovak Republic and a proclamation of the Ministry of Finance of Czechoslovakia, the texts of which are set forth in the body of the opinion, as evidence of the nationalization of the defendant Bank. At the trial, the defendant read into the record depositions by the Chairman of the Board of Directors and the Manager of the defendant, taken in the Peoples' Court of Prague. This testimony was offered to support the contention of the defendant that it had the capacity and the willingness to meet its responsibilities, that it had not been nationalized within the meaning of the Civil Practice Act, and that it was actually doing business.

Held: that the receivership must be made permanent on behalf of the one plaintiff not barred by the statute of limitations. Since the Law of the Czechoslovak Republic and the proclamation of the Ministry of Finance of Czechoslovakia indicated that the State Bank of Czechoslovakia would take over the rights and liabilities of the defendant and that the defendant would cease to exist, the evidence of the defendant that it had not been nationalized was not to be credited. The defendant having ceased to do business, the receivership must be made permanent.

The Court said: " Therefore, this Court has limited the trial before it to the issue of nationalization, with a consideration of whether the defendant has the capacity and willingness to meet its responsibilities to stockholders and creditors, as provided by Mr. Justice Levey. This Court will not consider anything else. Whatever has been heretofore decided will not be reviewed by this Court despite the contention of the defendant.

" This Court does not agree that only a portion of the issue of nationalization is before it. It is of the opinion that the entire issue of nationalization is open. It believes further that, under the order of Mr. Justice Levey, the burden of going forward with proof on the capacity and willingness of the defendant to meet its responsibilities is upon the defendant, but the ultimate burden of proof on the entire issue of nationalization is upon the plaintiffs. In other words, the plaintiffs must establish, by a fair preponderance of evidence, that the defendant bank was nationalized, as set forth in the Civil Practice Act, § 977–b, subd. 1.

" At the trial before this Court the defendant read into the record lengthy depositions of Dr. Jaraslav Fukatko, the Chairman of the Board of Directors of the defendant, and Ivan Petr, the Manager. These depositions were taken in the Peoples' Court of Prague, Czechoslovakia. The testimony was offered to support the contention of the defendant that it has the capacity and the willingness to meet its responsibilities, that it has not been nationalized within the meaning of the Civil Practice Act and that it is actually doing business.

" The testimony of these witnesses is entirely unsatisfactory. They were unable to produce a balance sheet, book entries, financial statements or any factual proof bearing upon the activities of the defendant and its assets and liabilities. They refused to give certain other information without permission of government authorities, yet they repeatedly asserted that the defendant is doing business and there has been no order issued by the Czechoslovakian government terminating its existence.

" At this point the Court invites attention to plaintiffs' ' Exhibit 1 ' in evidence. This Exhibit is a copy of Law No. 31 of 1950, enacted by the National Assembly of the Czechoslovak Republic on the 9th day of March, 1950. Article 2 of this law provides as follows:

> ' (1) The Bank shall take over gradually, according to the instructions of the Ministry of Finance, all rights and obligations of the . . . 2. Zivnostenka Banka National Corporation . . . .
>
> ' (2) The institutions mentioned in paragraph (1) shall end their activities by transferring to the Bank their rights and obligations, and shall cease to exist on a day to be determined by the Minister of Finance in a Notice to be published in the Collection of Laws.'

" The wording of the last mentioned Exhibit forces the conclusion that the defendant shall end its activities by a gradual transferring over of its rights and obligations and shall cease to exist on a day determined by the Minister of Finance, in a notice published in the Collection of Laws.

" The question, therefore, is presented, as to whether the defendant is still doing business or is it out of business and no longer in existence. In this connection it is important to know whether the Minister of Finance ever issued the notice referred to in plaintiffs' ' Exhibit 1 '. The defendant's witnesses, in their depositions, repeatedly stated that such notice was never issued by the Ministry, nor was its issuance contemplated.

" When an examination is made of plaintiffs' ' Exhibit 2 ', in evidence, and its contents read, it is difficult to understand the attitude and the testimony of these witnesses. Plaintiffs' ' Exhibit 2 ' is entitled ' Proclamation or Notice No. 383 of the Ministry of Finance, of June 17th, 1950 ' and it provides, amongst other things, as follows:—

> ' The Finance Ministry hereby publishes the following notice of instructions, pursuant to Article 2, subd. 1 of the Law No. 31 of 1950 of the Collection of Laws, concerning the State Bank of Czechoslovakia.
>
> ' (1) On the 3rd day of July, 1950, the State Bank of Czechoslovakia shall take over, besides the rights and liabilities listed in paragraph 2 and 3 hereof, all the rights and liabilities of . . . the Zivnostenka Banka National Enterprise, . . ., as of the state of business at the end of the second planning quarter of 1950, i.e. as of the 2nd day of July, 1950, e.g. their cash on hand, securities and coupons, bills of exchange and checks. . . .'

" It is true that the publication of this notice, plaintiffs' ' Exhibit 2 ', was made in the official Gazette of the Republic of Czechoslovakia, rather than in the so-called Collection of Laws. But this is immaterial. What is important is the fact that the Ministry of Finance did exercise the authority granted to it by plaintiffs' ' Exhibit 1 ', which resulted in the issuance of plaintiffs' ' Exhibit 2 '. Surely, if there is any explanation for plaintiffs' ' Exhibit 2 ' it should come from the defendant. But the record is silent as to any references to this Exhibit by any of the witnesses of the defendant. Should not the Chairman of the Board have known that such an order of the Finance Ministry had been issued and should he not have given some explanation about it instead of denying that such an order was ever issued?

" Since plaintiffs' ' Exhibit 1 ' says that defendant ' shall cease to exist on a day to be determined by the Minister of Finance, in a notice published in the Collection of Laws,' and since such notice was published by the Ministry on June 17th, 1950, plaintiffs' ' Exhibit 2 ', how can the defendant's witnesses continue to testify, under oath, that no such notice mentioned in plaintiffs' ' Exhibit 1 ' was ever issued or being contemplated and that the defendant is still doing business without any interference from the government? The conclusion is irresistible that the defendant has ceased to do business, it no longer exists and that it has not the capacity nor willingness to meet its responsibilities to stockholders and creditors.

" When it is further considered that the defendant seeks to justify the non-payment of the claims of the plaintiffs on the ground that their property was confiscated by government decree, resulting from their adjudication as enemies of the state, certainly the courts of this jurisdiction should apply the provisions of Section 977-b of the Civil Practice Act, which to this Court seem to be aptly applicable to the factual situation at bar. *Bata* v. *Bata*, 285 App. Div. 1050, 141 N.Y.S.2d 502. . . ."

[Reports: 155 N.Y.S. 2d 340; affirmed, 2 App. Div. 2d 958, 157 N.Y.S. 2d 904 (1956); affirmed, 3 N.Y. 2d 862, 166 N.Y.S. 2d 309, 145 N.E.2d 24 (1957); appeal dismissed, 356 U.S. 22, 2 L.Ed.2d 578, 78 Sup. Ct. 560 (1958).]

Recognition of Acts of Foreign States—Confiscatory Legislation—Extraterritorial Effect of—Expropriation of Foreign Business Enterprise by Foreign States—Transfer under Duress—Whether Joinder of Expropriating Government Required—The Law of the United States of America.

ZWACK *ET AL.* *v.* KRAUS BROTHERS & CO., INC.

United States, District Court, Southern District, New York. July 29, 1955.

Court of Appeals, Second Circuit. October 2, 1956.

THE FACTS.—This was an action by the partners in a Hungarian firm which manufactured and distributed liqueurs and cordials against the firm's distributing agent in the United States for the collection of a pre-existing indebtedness, an accounting of damages and profits resulting from trade-mark infringement and unfair competition, and injunctive relief.

In October 1948, representatives of the Zwack firm were summoned to the office of the Alcoholic State Control Monopoly of Hungary. They were accused of " known sympathy with industrialists ", of having sent money and formulae out of the country, and of being " politically undesirable ". They were informed that the Hungarian Government was prepared to buy the firm at about one thirty-fifth of its value. The partners were privately warned of the imminence of their arrest and imprisonment and of the confiscation of the firm. After abortive negotiations with the Hungarian Government for a passport in exchange for the business, one of the partners, John Zwack, fled the country and ultimately made his way to the United States, where he was subsequently joined by two other partners. After his flight, the Hungarian Government purported to accept the " offer " of the exchange of the firm for a passport and took over the business, but never tendered the passport. John Zwack thereupon notified the defendant that it should no longer deal with the firm under its new ownership. The defendant continued to transact business with the Hungarian Government and utilized the trade-marks and trade-names provided under a prior contract with the plaintiffs.

In the present action, the plaintiffs sought recovery of the assets of the firm, which had been frozen during the Second World War; damages for inability to manufacture its product as the result of the defendant's use of the plaintiffs' name and label; and an injunction to restrain the defendant's use of the plaintiffs' name, trade-marks, and bottle shapes.

The motion of the defendant to dismiss on the ground that the Hungarian Government was an indispensable party to the proceedings was denied (reported in *International Law Reports*, 1950, Case No. 8).

In the present proceedings, the defendant contended that under Hungarian law only the partnership as an entity, and not the plaintiffs as individuals, had standing to sue, and that the Court was without authority to inquire into the validity of the acts through which the Hungarian Government had acquired control of the firm. The plaintiffs maintained that the confiscation of the firm without adequate compensation should not be given extraterritorial effect in the courts of the United States and that the plaintiffs therefore remained the owners of the assets of the partnership situate in the United States. They also contended that compulsory joinder of the Hungarian Government would have the effect of confirming the confiscation in so far as it applied to assets in the United States, since the Hungarian Government, once joined, would be able to preclude further proceedings by asserting its jurisdictional immunity.

Held (by the District Court): that the plaintiff must be granted damages, an accounting, and the injunction sought. Under

Hungarian law an individual partner was entitled to bring this action on behalf of the partnership. The courts of the United States were not required to give extraterritorial effect to the confiscation of the plaintiffs' firm by the Hungarian Government. Having regard to the duress exercised on the plaintiffs, the firm was confiscated by the Hungarian Government and not voluntarily sold to it. [Report: 133 F. Supp. 929.]

On appeal,

Held (by the Court of Appeals): that the decree granting the injunction must be affirmed. Since the issue of damages had not yet been the subject of a final order in the Court below, the Court restricted itself to affirming the injunction.

It was against the policy of the law of the United States to give extraterritorial effect to confiscatory decrees of a foreign Government with respect to property situated in the United States, regardless of the validity of the decree to alter ownership within the foreign nation. This policy could not be defeated by a purported continuance of the partnership entity and confiscation of each partner's share within that foreign nation, nor by a sham sale for inadequate consideration. Since the facts elicited on trial established that the firm had been confiscated, the plaintiffs remained owners of the assets located in the United States.

The Hungarian Government was not an indispensable party to the suit, because the rights of that Government were not being directly decided. To allow joinder would preclude recovery by the plaintiffs because of the ability of the Hungarian Government to assert its sovereign immunity.

The Court said: " Before we can deal with the merits of the controversy we must dispose of a serious question concerning the plaintiffs' standing to bring this suit. Under applicable Hungarian law, which regards a partnership as an entity, the individual partners have no individual rights in the firm assets. Therefore, the plaintiffs' standing to sue can only be based on their claims to sue as partners in behalf of the firm. The defendant seeks to analogize the Hungarian entity concept of the partnership to the American concept of the corporation and argues that the partner's interest in the firm assets consists wholly of a claim of ownership in the firm having its exclusive situs at the firm residence in Hungary. It urges that the transfer of the plaintiffs' shares of ownership was accomplished in Hungary by official acts of the Hungarian government and therefore is not subject to collateral attack outside of Hungary even if confiscatory and therefore against the public policy of the forum. They cite *Underhill* v. *Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456; *Banco de Espana* v. *Federal Reserve Bank*, 2 Cir., 114 F.2d 438,[1]

[[1] See *Annual Digest*, 1938–1940, Case No. 6.]

and *Bernstein* v. *Van Heyghen Frères Société Anonyme*, 2 Cir., 163 F.2d 246, 249.[1] In reliance on this doctrine the defendant contends that the plaintiffs have no standing to sue and the action should have been dismissed.

" The plaintiffs base their claim of right to challenge Hungarian ownership of firm assets in the forum on the doctrine that foreign acts of confiscation are presumed to be against the public policy of the forum, *Plesch* v. *Banque Nationale de la République D'Haiti*, 273 App.Div. 224, 77 N.Y.S.2d 43, affirmed 298 N.Y. 573, 81 N.E. 2d 106,[2] and will not be given extraterritorial effect, *Baglin* v. *Cusenier Co.*, 221 U.S. 580, 31 S.Ct. 669, 55 L.Ed. 863; *Ingenohl* v. *Walter E. Olsen & Co.*, 273 U.S. 541, 47 S.Ct. 541, 71 L.Ed. 762; *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U.S. 90, 39 S.Ct. 48, 63 L.Ed. 141; *Vladikavkazsky Ry. Co.* v. *New York Trust Co.*, 263 N.Y. 369, 189 N.E. 456, 91 A.L.R. 1426,[3] absent a treaty or other indication of a public policy to do so, *United States* v. *Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796,[4] *United States* v. *President and Directors of Manhattan Co.*, 276 N.Y. 396, 12 N.E.2d 518. Thus their argument runs that even if Hungarian ownership of the firm is conclusive as to the firm assets in Hungary, the issue of firm ownership is open to collateral inquiry in the United States courts where firm assets having a situs in the forum are concerned.

" We think that, where firm assets existing in the forum are concerned, technical considerations as to the manner in which the foreign state seeks to expropriate them are not controlling. Prior to confiscation the assets of the firm both here and in Hungary were equitably owned by the plaintiffs as the sole partners in the firm. It is clear that the Hungarian government could not directly seize the assets which have a situs in the state of the forum. To allow it to do so indirectly through confiscation of firm ownership would be to give its decree extraterritorial effect and thereby emasculate the public policy of the forum against confiscation. This we decline to do. See 57 *Yale Law Journal* 108. We sustain the plaintiffs' standing to bring and prosecute the complaint here involved.

" We next turn to the pre-trial order reported at D.C., 93 F. Supp. 963, 965, which denied the defendant's motion to dismiss for failure to join Bela Zwack, Dora Zwack, the Hungarian government and the ' presently existing firm of J. Zwack & Company of Budapest, Hungary ' as indispensable parties.[5] Since Bela and Dora Zwack have since appeared as parties plaintiff by leave of this court we need only examine whether the Hungarian government, as the sole owner of the nationalized firm, is an indispensable party to this action.

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[1] See *Annual Digest*, 1947, Case No. 5.]

[2] *Ibid.*, Case No. 25, and *ibid.*, 1948, Case No. 7.]

[3] *Ibid.* ,1933–1934, Case No. 27.]

[4] *Ibid.*, 1941–1942, Case No. 13.]

[5] In another pre-trial order reported at D.C., 97 F.Supp. 719, the plaintiffs' motion for a preliminary injunction was denied.

"It is clear that the Hungarian government is not subject to the jurisdiction of the court below unless it should voluntarily appear. To hold that its joinder is indispensable to the maintenance of this action would not only deprive the plaintiffs of any remedy, a result which a court will properly strain to avoid,[1] but would effectively accomplish for the confiscating government precisely what we hold it cannot do, i. e., confiscate at will assets having a situs within this country. The decree below did not purport to adjudicate rights between the plaintiffs and the Hungarian government either in Hungary or in the United States but merely settled rights between the parties to the suit as to the property located in the United States. At most it made a preliminary decision of issues between the plaintiffs and the Hungarian government in order to determine the question of the plaintiffs' standing to sue. If that government had desired to intervene in the action on those issues it could have done so. It had sufficient actual notice for that purpose through its agent in the United States, the defendant. We hold that the Hungarian government was not an indispensable party."

[The Court then discussed an issue of the municipal law of the United States.]

"The appellant assigns error on the ruling of the court that defendant's Exhibits WW and YY were inadmissible. These were certifications by Hungarian officers purporting to show surplus profits tax due from the firm prior to November 1948. It appears that they comprised answers to unilateral interrogatories and not 'document[s] of record or on file in a public office of a foreign country . . . certified by the lawful custodian thereof'. Cf. 28 U.S.C.A. § 1741. Since they purport to evidence the truth of the verbal matter asserted therein and do not evidence a recorded act, they fall within the hearsay rule and were properly excluded. *United States* v. *International Harvester Co.*, 274 U.S. 693, 703, 47 S.Ct. 748, 71 L.Ed. 1302; *cf. Vanadium Corp. of America* v. *Fidelity & Deposit Co.*, 2 Cir., 159 F.2d 105. But even if technically the documents were admissible, the ruling would not constitute reversible error. The effect of this evidence would have been for the court to decide and in its opinion the court properly observed that it considered similar documents of slight evidentiary weight.

"We come now to the central issue in the case. It is essentially an issue of fact, viz., did the Hungarian government, as the plaintiffs contend, confiscate the plaintiffs' business with the appurtenant trade-marks legally or equitably owned by the plaintiffs? Or, did the Hungarian government, as the defendant contends, acquire the plaintiffs' business and trade-marks through a voluntary sale thereof by the plaintiffs? This issue the court below found favorably to the plaintiffs. We cannot say that the finding was clearly erroneous. There was evidence that in making any nominal transfer of the business to the government the Zwacks were actuated by coercion and fear of political reprisals. The evidence amply supported the finding that there was no substantial consideration for a transfer and that even the nominal consideration was not actually and wholly delivered. It is conceded that since late 1948 the Hungarian government has assumed to act as owner of the business. Whether its claimed ownership resulted from 'confiscation,' or from a 'nationalization' of the business, or from 'expropriation' is not important for present purposes. And we may assume for all present purposes that the Hungarian government has the right and power to enforce its title to assets of the business located in Hungary and its right to the use of the appurtenant trade names and marks in Hungary.

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[1] See *Bourdieu* v. *Pacific Western Oil Co.*, 1936, 299 U.S. 65, 70, 57 S.Ct. 51, 81 L.Ed. 42.

"But even so, it does not follow that courts in this country must recognize Hungarian claims of title to property situated in this country or rights with respect to commerce in this country which were acquired only by coercion practiced on the owners without substantial consideration. On the facts of this case we think Judge Palmieri was right in his refusal to recognize rights to trade names so derived and in treating the plaintiffs as the equitable owners. The governing principles are set forth in *Baglin* v. *Cusenier Co.*, *supra*. See also *Lecouturier* v. *Rey* [1910] A.C. 262; *Plesch* v. *Banque Nationale de la République D'Haiti*, *supra*; *United States* v. *Pink*, *supra*; *Ingenohl* v. *Walter E. Olsen & Co.*, *supra*; *Bernstein* v. *N. V. Nederlandsche-Amerikaansche*, etc., 2 Cir., 210 F.2d 375, modifying, 2 Cir., 173 F.2d 71,[1] 57 *Yale Law Journal* 108. There was neither a finding nor evidence to support a finding that the plaintiffs had abandoned their trade-marks and names. *Cf. Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 273 U.S. 629, 47 S.Ct. 481, 71 L.Ed. 810. We agree with him that *Société Vinicole de Champagne* v. *Mumm Champagne & Importation Co.*, D.C., 10 F.Supp. 289; Id., D.C., 13 F.Supp. 575,[2] is distinguishable and not to the contrary.

"We conclude that the injunctive relief accorded to the plaintiffs was rightly granted . . ."

(The Court, in concluding, set forth its reasons, grounded in municipal law, for only partial affirmance of the decree below.)

[Report: 237 F.2d 255.]

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[1] See *Annual Digest*, 1948, Case No. 10, and *International Law Reports*, 1953, p. 24.]

[2] See *Annual Digest*, 1935–1937, Case No. 225.]

Recognition of Acts of Foreign Governments—Inter-governmental Patent Release—Whether Constituting an International Agreement—Diplomatic Controversy Concerning—Political Question—Adjudication of Rights to Property—The Law of the United States of America.

Smiths America Corporation *et al.* v. Bendix Aviation Corporation.

United States, District Court, District of Columbia.

February 17, 1956.

Court of Appeals, District of Columbia Circuit.

September 19, 1957.

The Facts.—This was an action for patent royalties which accrued during the period 1941 to 1944 under a cross-licensing contract concluded in 1936 by the plaintiff British manufacturer and the defendant United States corporation. During the Second World War the defendant produced sextants for the United States Government and utilized patents which were the subject of the contract.

On August 26 and November 10, 1941, the British Government granted a written release of the plaintiff's device to the United States Government with permission to manufacture and use the patents without payment of royalties. The defendant was chosen as the manufacturer of the device by the United States Government. The defendant did not render an accounting or pay royalties to the plaintiff for items produced for that Government and informed the plaintiff in 1947 that since the release barred such royalty payments, the plaintiff would have to look to the British Government for compensation. In 1950, it became apparent that the British Government did not regard itself as liable for the royalties, and the plaintiff instituted the present action. In 1953, the United States Department of State and the British Foreign Office began an exchange of diplomatic correspondence concerning the validity of the letters of release as an agreement between the two Governments. The controversy had not been resolved at the time of this action.

The defendant raised four defences to the suit, three of which were grounded in the municipal law of the United States. As its fourth defence, it contended that the existence of a diplomatic controversy about the release indicated that the effectiveness of the release was for political rather than judicial determination. The plaintiff maintained that the question was purely one of private rights arising under a private contract.

Held: that the defendant must pay the plaintiff the royalties accruing under the terms of the 1936 contract. The release granted by the letter of the British Government was not admissible in evidence as a matter of the municipal law of the United States. Furthermore, the jurisdiction of the political arm of the Government extended to such matters as the recognition of new Governments or the making of treaties, but not to the direct determination of property rights. That question was within the exclusive jurisdiction of the courts.

After disposing of the issues of domestic law, the Court said:

" One other question must be disposed of at this point. Defendant, at the trial, stated that there had been an interchange of diplomatic correspondence between the State Department and the British Foreign Office which began in December of 1953, as to the validity of the letters of August 26 and November 10, 1941, and as to whether or not they were effective as an agreement between the two governments. Defendant contended that if they were so effective, it would clearly be a question of a political nature. Defendant argued further, that there is a continuing diplomatic controversy on the subject between the government of the United States and Great Britain, and that the validity of the release, therefore, is a matter for political rather than judicial determination.

" Defendant, in support of its contention, relies on the case of *Z. & F. Assets Realization Corporation* v. *Hull*, 72 App. D.C. 234, 114 F.2d 464, affirmed 311 U.S. 470, 61 S.Ct. 351, 357, 85 L.Ed. 288.[1] In that case a Mixed Claims Commission, consisting of American and German members, was set up pursuant to an agreement between this country and Germany, the agreement empowering the Commission to hold hearings and to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under two treaties previously made between the two countries. Subsequently awards were made and certified by the Secretary of State to the Secretary of the Treasury pursuant to the War Claims Act of 1928. A declaratory judgment was then sought by the petitioner to declare the awards null and void and to enjoin the Secretary of State from certifying the awards and the Secretary of the Treasury from paying them. The Supreme Court, in its determination, held that the validity of the awards was political in nature, and not an appropriate question for judicial determination.

" This Court is of the opinion that the facts as set forth in the case above are clearly distinguishable from those in the instant case. Here, no international commission has been set up to determine the rights of these parties, nor are plaintiffs challenging an award made by any such body, and in doing so, questioning the acts of the Secretary of State or the Secretary of the Treasury.

[[1] See *Annual Digest*, 1941–1942, Case No. 134.]

" At one point in his Concurring Opinion, Mr. Justice Black said:

' Nowhere in the Act is there any language which either expressly or by fair implication indicates a purpose of Congress to permit some claimants to resort to the courts—as petitioners here have done—to determine the propriety of awards by the Mixed Claims Commission to other claimants.'

And earlier, in the Opinion of the Court it was stated:

' Petitioners must claim solely by virtue of their interest in the fund created by the statute and under its terms they are not entitled to complain of payments out of that fund of awards which the Secretary of State has certified.'

" In the present case, there is no Act of Congress directing what shall be done under facts similar to those in this action, and plaintiffs are not dependent for the enforcement of their claims on the awards of any international commission, or the payment of such award out of a fund set up by Act of Congress. Plaintiffs' claims in this action are based on a contract under seal between themselves and defendant. While the Court recognizes that the Executive Department has jurisdiction in purely political matters, the Court is also aware that when private property rights are in issue the Courts rather than the Executive Department have jurisdiction. As was stated by the Court in *Banco de Espana* v. *Federal Reserve Bank*, 2 Cir., 114 F.2d 438, 442[1]:

' The courts will leave for the executive the determination of all " political " issues; in the international field this means such matters as the recognition of new governments or the making of treaties, not the direct determination of questions of property.'

Citing for comparison, *Doe ex dem. Clark* v. *Braden*, 16 How. 635, 57 U.S. 635, 14 L.Ed. 1090; *Z. & F. Assets Realization Corp.* v. *Hull*, 72 App.D.C. 234, 114 F.2d 464; Field, The Doctrine of Political Questions in the Federal Courts, 8 *Minn.L.Rev.* 485; Jaffe, *Judicial Aspects of Foreign Relations* (1933) pp. 8–78.[2] And in *Sullivan* v. *State of Sao Paulo*, 2 Cir., 122 F.2d 355, 358,[3] the Court held that:

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[1] [See *Annual Digest*, 1938–1940, Case No. 6.]

[2] For a further general treatment of the problem of political questions, *cf.* also *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 69 S.Ct. 140, 93 L.Ed. 76, rehearing denied 336 U.S. 928, 69 S.Ct. 652, 93 L.Ed. 1089 [*Annual Digest*, 1947, Case No. 18]; *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568; *United States* v. *State of California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889, rehearing denied 332 U.S. 787, 68 S.Ct. 37, 92 L.Ed. 370, opinion supplemented 332 U.S. 804, 68 S.Ct. 20, 92 L.Ed. 382; *Clark* v. *Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 [*Annual Digest*, 1947, Case No. 82]; *United Public Workers, etc.* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754; *Ex parte Sawyer*, 124 U.S. 200, 8 S.Ct. 482, 31 L.Ed. 402; *Sevilla* v. *Elizalde*, 72 App.D.C. 108, 112 F.2d 29; *Burlingham* v. *United States*, 8 Cir., 34 F.2d 881.

[3] [See *Annual Digest*, 1941–1942, Case No. 50.]

'The adjudication of present rights to property within a court's jurisdiction is, however, a purely judicial function, which no Executive department of the Government is constitutionally or practically equipped to discharge.'[1]

"Under the circumstances of the instant case it is the Court's conclusion that private property rights alone are involved, and, consequently that the Court has jurisdiction over the controversy."

[Reports: 140 F. Supp. 46; affirmed on other grounds, 248 F.2d 621.]

Recognition of Acts of Foreign States—Foreign Legislation Nationalizing Company Incorporated Abroad—Whether Action on Behalf of Nationalized Company Admissible in Country of Forum—The Law of France.

ILITCH *v.* BANQUE FRANCO-SERBE.

France, Tribunal de Commerce de la Seine. February 9, 1956.

THE FACTS.—The plaintiff, a Yugoslav citizen resident in France, had been a shareholder in a Yugoslav limited company which was nationalized by a Yugoslav Law of December 5, 1946. During the Second World War the Company had paid large sums of money to the defendant Bank for the purpose of enabling the latter, through the intermediary of a Turkish bank, to open letters of credit in favour of various suppliers in Turkey from whom the Company had ordered goods for import into Yugoslavia. Political events during the war prevented the import of these goods, with the result that the letters of credit were not encashed by the Turkish suppliers. In the present action the plaintiff claimed repayment of the moneys paid to the defendant Bank, together with interest. He purported to act on behalf of the Company, alternatively on his own behalf as the only surviving shareholder and sole heir of all the other shareholders. The defendant Bank contended that as the Company had been nationalized by a Yugoslav Law which was entitled to recognition in France, the plaintiff was not entitled to bring an action on behalf of a non-existent entity; nor was he entitled to bring an action on his own behalf, because a company and its shareholders were separate entities in law.

Held: that the contentions of the defendant Bank must be upheld and the action dismissed.

The Court said: "First of all, the plaintiff has to prove the existence, in fact and in law, of the company which he alleges he represents. Neither his capacity as alleged heir of the majority of shareholders, nor his capacity as a shareholder himself, nor the powers which he says he holds, can—even if their validity could not be doubted by reason of the exceptional circumstances in which they are said to have been conferred on him—be decisive in this respect. An affidavit sworn on November 15, 1954, by a Belgrade lawyer states that the firm of Kosta Ilitch & Sons . . . became a limited company in 1910 . . . and that on April 6, 1941, when the war against Yugoslavia began, the members of the administrative council of the Company were the following: . . . [The Court then set out further facts contained in the affidavit, and continued:] It follows from these statements that the Company was a company under Yugoslav law and that it had its seat and main establishment in Yugoslavia. The conditions of its existence and its validity were therefore governed exclusively by Yugoslav law. The affidavit of November 15, 1954, shows that the Company was nationalized in pursuance of a Yugoslav Law of December 5, 1946, concerning the Nationalization of Private Enterprises, which was published in the Official Gazette of December 6, 1946. By virtue of Articles 1 and 4 of that Law, the movable and immovable assets, as well as all the other rights of the Company, became the property of the Yugoslav State. Thus the Law put an end to the existence of the Company and the powers vested in its former directors and agents. The plaintiff cannot validly maintain that the Law of December 5, 1946, has no legal effect in France. A foreign company can only exist, as far as French law is concerned, if the law under which it has been formed recognizes its existence. The French courts cannot, therefore, recognize a company in France if the law of that company, which alone can give and deprive it of legal personality, decides on its extinction. While the French courts cannot lend their aid to the execution of a foreign seizure or expropriation—which is a question of the creation of rights, they must give effect to the transfer of property resulting therefrom—which is a question of efficacy. The extinction of a foreign legal entity by legislation is not contrary to the French *ordre public*. France has recognized the Government of the Yugoslav Federal People's Republic as from December 31, 1945. It is also of interest to note that, by Article 8 of the Nationalization Law, the Yugoslav State has undertaken to compensate the owners of nationalized enterprises. By a Law dated July 21, 1952, the French Parliament authorized the President of the Republic to ratify the Franco-Yugoslav Agreement of April 14, 1951, governing the question of compensation in respect of French interests nationalized in Yugoslavia. It follows that when the action was brought on February 9, 1954, the Company in whose name the plaintiff says he was instituting proceedings was no longer in existence as far as French law is concerned. He has not proved—or even alleged—that the Company has a branch establishment or agency in France, such as might confer on it a factual existence enabling it to enforce its contracts in France, to recover its debts and to exercise all its rights, notwithstanding the measures of nationalization taken against it, such measures being incapable, in principle, of producing any effect outside the territory of the Yugoslav State. In these circumstances the Company is not validly represented in this action.

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[1] See also 3 Willoughby, *Constitutional Law*, 2nd Ed., Chap. 73, page 1336 under political questions, where it is said: "Courts will exercise jurisdiction where property rights are involved."

"Nor is the plaintiff in his capacity as a former shareholder entitled to recover his proportionate share of the debt. Such capacity cannot confer on him the right to proceed against the defendant Bank, in the absence of any proof of direct legal relationship between himself personally and the defendant Bank. Shareholders are not entitled to proceed against third parties in the name of a company which they do not represent. The plaintiff's claim is therefore inadmissible, without prejudice to the possible right of any other person who may be qualified to bring fresh proceedings."

[Reports: *Revue critique de droit international privé*, 45 (1956), p. 647; *Gazette du Palais*, May 16–18, 1956.]

Recognition of Legislative Acts of Foreign States—Confiscation of Property in Special Circumstances—Confiscation of German Property by Netherlands Legislative Decree for Purpose of Reparation Due from Germany—Right of German Owners to Institute Proceedings for Return of Property—Paris Agreement of October 23, 1954, on Settlement of Matters Arising out of the Occupation of Germany—Competence of German Courts.

AKU CASE.

German Federal Republic, Federal Supreme Court. December 13, 1956.

THE FACTS.—The defendant Company, the Algemeene Kunstzijde Unie (AKU), was a company incorporated in the Netherlands. Before the Second World War AKU had acquired considerable interests in German companies, and as a result of exchanges of shares taking place in connection with the acquisition of such interests a large part of the share capital of AKU was owned by German shareholders. The plaintiffs were German nationals who owned shares in AKU and whose share certificates and other documents of title were deposited partly in Germany and partly in a German bank in the Netherlands. In 1944 the Netherlands Government enacted a Decree whereby "German enemy property" was confiscated and vested in the State of the Netherlands. In pursuance of this Decree the Powers occupying Germany after the Second World War handed such of the plaintiffs' shares in AKU (and other documents of title) as were in Germany to the Netherlands Government. The plaintiffs thereupon brought an action against AKU for a declaration that the confiscation of their shares was invalid; alternatively, that in any event it was of no legal effect in so far as concerned the assets of AKU situate in Germany, *viz.*, AKU's holdings in German companies, with the result that the plaintiffs were entitled to a share in AKU's German holdings in the proportion which such holdings bore to the total nominal value of AKU's share capital. AKU contended that the plaintiffs were not entitled to institute the present proceedings, on the ground that Article 3 (3) of Part 6 of the Paris Agreement of October 23, 1954, on the Settlement of Matters arising out of the Occupation of Germany (which is concerned with reparations payable by Germany) provided expressly that no action could be brought against foreign nationals who had acquired German property confiscated for the purpose of reparation or who had acted on the instructions of foreign (Allied) Governments.

Held: that as according to the Netherlands Decree the shares were confiscated for the purpose of reparation, and as according to the Paris Agreement the *situs* of the plaintiffs' assets was immaterial, the German Courts, by virtue of Article 3 (3) of Part 6 of the Paris Agreement, were precluded from adjudicating upon the plaintiffs' claim. The action must accordingly be dismissed.

The Court said: " The provision here referred to (Article 3 (3) of Part 6 of the Paris Agreement) excludes the competence of the German Courts to a greater extent than did Law No. 63 of the Allied High Commission. Law No. 63 was applicable only where the confiscated asset which was German-owned was situate *in a foreign State.* Article 3 of Part 6 of the Transitional Agreement (except for German property in Austria) is no longer subject to this condition. On the contrary, by paragraph 1 of this provision the Federal Republic renounced all objections to measures ' taken or to be taken against *German external or other property* which has been seized for the purpose of reparation ' or other purposes there named. Paragraph 3 provides that in such cases actions ' shall not be admissible ', which can only mean here (as in Article 3 of Law No. 63) that actions cannot be brought. Article 3 of Part 6 of the Transitional Agreement therefore includes—apart from the special measures against German external assets in Austria which are provided for in paragraph 2—measures of the kind referred to against German assets which are not situate abroad but in Germany itself. The sole condition, therefore, which must now be satisfied in order that the jurisdiction of the German Courts shall be excluded is that the claim is concerned with an asset seized for the purpose of reparation or one of the other purposes referred to in paragraph 1. Having regard to the fact that it is not disputed that the confiscations of German property in pursuance of the Netherlands Decree of October 20, 1944, were carried out for purposes of reparation, the question as to the admissibility of this action depends only on whether the holdings which are the subject of the proceedings must be deemed to have been confiscated by the Netherlands Decree to the extent to which they are still claimed by the plaintiffs. *This* question can be determined only by the law of the confiscating State, *viz.*, in this case by the law of the Netherlands. This is expressly laid down in Article 1 (1) (*a*) of Law No. 63, and applies equally to Article 3 of Part 6 of the Transitional Agreement. According to that provision the *situs* of the confiscated assets is relevant, if at all, only for the decision on the extent of the foreign confiscation which has to be made in accordance with the law of the confiscating State. For this reason the question of *situs* must also be determined in accordance with that foreign law. The judgment of this Senate of March 24, 1955 (BGHZ, vol. 17, p. 74; NJW, 1955, p. 868) is not contrary to this view. It is true that according to that judgment, where Law No. 63 has to be applied, the question as to whether the confiscated asset was situate abroad must be determined in accordance with German law, including the German rules of the conflict of laws, because Law No. 63 left it open to the German Courts to examine this prior condition of the applicability of that law in accordance with German law, but the position is different in the present case, where Article 3 of Part 6 of the Transitional Agreement has to be applied. This latter provision, as has already been pointed out, in contradistinction to Article 1 of Law No. 63, does not require that the confiscated asset shall be situate abroad. It accordingly does not confer a right to examine this question in accordance with German law. The appeal Court was therefore right and acted in accordance with the legal position resulting from the Transitional Agreement when it examined by reference to the law of the Netherlands the question whether the rights claimed by the plaintiffs were expropriated by the Netherlands. It determined this question in the sense that according to the law of the Netherlands the rights of the plaintiffs were extinguished to their fullest extent and that there was no severance of part of those rights, *viz.*, those of the assets of the defendant Company which are situate in Germany, which could be said not to have been affected by the confiscation."

The Court then dealt with the question whether it was entitled to enquire into the interpretation of Dutch law adopted by the Court below. This question, in accordance with the German law of procedure, was answered in the negative, as was the further question whether the Court had power to refuse the application of Dutch law on the ground that it was contrary to the German *ordre public*. The Court expressed the view that Article 3 of Part 6 of the Transitional Agreement left no room for an enquiry as to whether Dutch law was contrary to the German *ordre public*. The Court then said in conclusion: " As according to the foregoing the conditions of Article 3 of Part 6 of the Paris Transitional Agreement must be held to be present, the action is inadmissible by virtue of paragraph 3 of this provision. In the result, the judgments of the Courts below must be affirmed and the action dismissed."

[Report: NJW, 10 (1957), p. 217.]

Recognition of Acts of Foreign States and Governments—Expropriation Decrees—The Law of Switzerland.

VEREINIGTE CARBORUNDUM- UND ELEKTRITWERKE *v.* FEDERAL DEPARTMENT FOR INTELLECTUAL PROPERTY.

Switzerland, Federal Tribunal. September 25, 1956.

THE FACTS.—The Czechoslovak limited liability company " Vereinigte Carborundum- und Elektritwerke " was the owner of a trademark, " Carborundum ", registered in Switzerland and protected up to February 15, 1955. In November 1954 the Company was nationalized and its property handed over to the national undertaking running the works of the Company in Nové Baratky. In December 1954 the national undertaking requested the Swiss Federal Department for Intellectual Property to renew the trademark in its name. In May 1955 the Department rejected that request on the ground that it did not recognize the national undertaking as the legal successor of the limited liability company which had owned the trademark: the nationalization of a private undertaking had only territorial effect, and, in the absence of full compensation, was also contrary to Swiss public policy. This was an appeal against that decision. The appellant relied on Decree No. 100 of the President of Czechoslovakia, dated October 24, 1945, under which the undertaking owned by the limited liability company was nationalized, and a Decree of January 15, 1946, and an Order of March 8, 1946, under which the appellant was created and the undertaking transferred to it, to show that it was the legal successor of the limited liability company.

Held: that the appeal must be rejected. Foreign public law was exclusively territorial in effect. The Court said, on this point: " According to Swiss opinion, the Decrees relied on by the appellant contain public law since they provide for the transfer of property to the State (or to the appellant by virtue of public authority). It is a generally recognized principle of international law that public law has validity only in the State enacting it (principle of territoriality). Accordingly, foreign public law cannot be applied or enforced in Switzerland unless Swiss public policy demands it—in particular, because Switzerland undertook by treaty to do so, or because the foreign public law supports private law which is applicable in Switzerland, *e.g.*, by intervening in private law relationships primarily or exclusively for the protection of those relationships. (BGE, 39, II, p. 652; 42, II, p. 183; 50, II, p. 58; 74, II, p. 229; 80, II, p. 61.)

" The expropriation of the assets of the limited liability company Vereinigte Carborundum- und Elektritwerke does not constitute such an exception. There is no Swiss legal rule, and in particular no treaty provision, which would oblige Switzerland to apply the Czechoslovak expropriation decrees to property situate in Switzerland, and it cannot be maintained that these decrees serve the protection of private law relationships. The expropriation of property outside the territory of the expropriating State is considered by writers to be inadmissible (Neumayer, *Internationales Verwaltungsrecht*, 4, 101, 256, 436; Schindler in *Schweizerisches Jahrbuch für internationales Recht*, 3 (1946), pp. 65 ff; Bindschedler, *Verstaatlichungsmassnahmen und Entschädigungspflicht nach Völkerrecht* (1950), p. 86; Schaumann in *Schweizerisches Jahrbuch für internationales Recht*, 10 (1953), pp. 168 ff; Raape, *Internationales Privatrecht* (4th ed., 1955), pp. 614 ff.) It is irrelevant whether compensation was granted in this case or not. Admittedly the view is occasionally expressed at the present time that a State is entitled to expropriate even property situate outside its territory against adequate compensation, provided such action does not violate the ' public policy ', *i.e.*, the interest, of the State in whose territory the property is situate (Wolff, *Private international law* (1945), p. 536; Dicey, *Conflict of Laws* (6th ed., 1949), pp. 155–157; *cf.* Seidl-Hohenveldern, *Internationales Konfiskations- und Enteignungsrecht* (1952), pp. 179 ff.). This view is, however, rightly contested (see, *e.g.*, Beitzke, ' Probleme der Enteignung im internationalen Privatrecht ', in *Festschrift für Raape*, 1948, pp. 110 ff.; Schaumann, *loc. cit.*). It does not take account of the fact that all property is subject to the sovereignty of the State wherein it is situate and that its expropriation by another State constitutes an infringement of that sovereignty. It is accordingly unnecessary to declare such acts to be generally legal. If the State in whose territory an item of property is situate considers that expropriation of that property does not violate its interests, or that its expropriation should be recognized for special reasons, it can make appropriate provision. From the point of view of international law the territorial State is not bound to recognize the expropriation by a foreign State unless it has agreed by treaty so to do.

" Moreover, there is no doubt that in the present case we are dealing not with expropriation subject to adequate compensation, but with acquisition without compensation (confiscation). Admittedly, Decree No. 100 of October 24, 1945, provides for compensation in certain cases of expropriation. However, the Order of March 7, 1946, contains no reference to the compensation of the expropriated parties, and the appellant refers merely to the provisions of the

Decree, remaining silent about the details of compensation in this case—such as the names of shareholders to whom compensation was paid, and the amount, nature, and time of payment—even though the Federal Department for Intellectual Property attached importance to the question of compensation in its letter of January 25, 1955, and based its decision of May 7, 1955, on the fact that no indications had been given as to compensation of the former private owners of the business. . . .

" If, then, Czechoslovakia could not expropriate the rights to the trademark registered in Switzerland and transfer them to the appellant, the latter cannot ask for the renewal of the trademark or its transfer to a new owner. The question whether the expropriation (confiscation) by the Czechoslovak authorities is contrary to Swiss public policy and must therefore be refused recognition on that ground, does not arise."

[Report: *Recueil officiel des Arrêts du Tribunal fédéral Suisse*, vol. 82 (1956), p. 196.]

Recognition of Foreign Legislation—Foreign Revenue Laws—Enforceability of—Agreements between Individuals to Evade Foreign Revenue Law—The Law of Luxemburg.

BUREAUX BRASSEUR *v.* CEBELAC.

Luxemburg, Cour Supérieure de Justice. February 2, 1956.

THE FACTS.—In an action for enforcement of a contract made in Luxemburg, the defendant contended that the contract was unenforceable on the ground that one of its purposes was to defraud the Belgian revenue authorities.

Held: that the defendant's contention must be rejected. In the absence of specific treaty provision to the contrary, the revenue laws of a foreign State must be disregarded by the courts of Luxemburg.

The Court said: " A contract designed to infringe foreign law can be invalidated as being contrary to good morals and international public policy, more particularly where it is intended to import goods into a foreign country in violation of that country's customs laws. The respect which one country owes to the sovereignty of another, as well as the rules of international courtesy, preclude a State from constituting itself an accomplice, on its own territory, of dishonest dealings which have the object of causing damage to another State, thwarting its laws, or interfering in its internal affairs. This does not apply, however, to the evasion of revenue laws, because laws imposing taxes and governing their collection form part of the political laws which are essentially territorial; they have no authority abroad and they do not create acquired rights which must be observed in the mutual relations between two States. In the present case the lower Court merely had to apply municipal law because the evasion of Belgian revenue law does not cause any social disturbance in the country in which the case had to be determined. A consideration of foreign public policy would have been obligatory for the local Judge only if there had been a treaty between Belgium and the Grand Duchy requiring, for reasons of mutual obligations between the Contracting States, the full application of the law of the neighbouring State. The Treaty concluded between Belgium and the Grand Duchy on March 9, 1931, only served the purpose of avoiding double taxation in the matter of direct taxes and ensuring reciprocal assistance in the matter of collection of these taxes. It was not concerned with the imposition of taxes as such. There was accordingly no reason for the Court below to deviate from the rule that the courts of a State need not take into account foreign public policy which does not accord with the public policy of the *forum*."

[Report: *Pasicrisie luxembourgeoise*, vol. XVI, p. 425.]

Recognition of Acts of Foreign States—Condemnation of Land—Contract with Government for Use of Airfield—Restrictions by Foreign State on Use of Lands Adjacent to Airport.

PASOS *v.* PAN AMERICAN AIRWAYS, INC.

United States, Court of Appeals, Second Circuit. January 23, 1956.

THE FACTS.—This was an action in a United States federal district court to recover damages for the defendant's alleged trespass upon and unlawful occupation and use of the plaintiff's land in Nicaragua. In 1927, the Government of Nicaragua had turned over certain land, including that of the plaintiff, to the United States. In 1928, the defendant secured permission from the United States to use for commercial purposes the airfield built upon this land. The Government of Nicaragua had instituted condemnation proceedings in 1932 to acquire the land in question. After the departure of the United States forces in 1933, the Government of Nicaragua assumed occupancy and control of the land. In 1932 and 1934, that Government entered into contracts with the defendant providing for the continued use of the airfield by the defendant. The President of Nicaragua had issued decrees prohibiting the construction of buildings within 500 metres of any airfield without the permission of the Government and restricted the height of nearby buildings to 30 feet.

The defendant moved to dismiss the action on the grounds that the court had no jurisdiction over an alleged trespass to land outside the United States and that a decision in favour of the plaintiff would require the court to exceed its power by invalidating domestic acts of a foreign Government. The plaintiff contended that the jurisdiction of the court had been expanded to include such a trespass and that the court might declare the invalidity of the acts alleged because the principle precluding inquiry into the domestic acts of a foreign Government applied only to " physical " acts. The United States District Court for the Southern District of New York dismissed the action for lack of jurisdiction.

On appeal,

Held: that the case must be remanded to the trial Court with directions to dismiss the complaint for lack of jurisdiction. Federal courts did not have jurisdiction over trespasses to land situated outside of the United States. Furthermore, a court could not declare invalid the acts of a foreign Government, whether such acts were " physical " or otherwise.

After disposing of the issues of domestic law, the Court said: " If the district court had jurisdiction, then it correctly dismissed the complaint on the merits. For that court found—in findings which are supported by the evidence and thus not ' clearly erroneous '—that to decide the case for plaintiff, the court would have to hold invalid several domestic acts of the government of Nicaragua. This may not be done. See, *e.g.*, *Underhill* v. *Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456; *Banco de Espana* v. *Federal Reserve Bank*, 2 Cir., 114 F.2d 438, 443–444,[1] and cases there cited and discussed. We reject plaintiff's contention that this doctrine applies solely to ' physical ' acts of a foreign government. Moreover, the evidence shows that a decision for plaintiff would necessitate holding invalid several ' physical ' acts by the government of Nicaragua."

[Report: 229 F.2d 271.]

Recognition of Acts of Foreign States—Registration of Trade-Mark in Foreign State—Registration by Infringer of Trade-Mark within State Concerned—Protection of Industrial Property—Impact of Foreign Infringement within Territory of State Concerned—Authority of State to Regulate Conduct of Nationals and Aliens Abroad—The Law of the United States of America.

See p. 276 (*Ramirez & Feraud Chili Co.* v. *Las Palmas Food Co., Inc., et Al.*).

Recognition of Acts of Foreign States—Acquisition of Share Certificates—Evidence of *de facto* Possession—Whether Sufficient to Establish Claim to Immunity—Necessity for Dedication to Public Use—The Law of Hong Kong.

See p. 234 (*Midland Investment Co., Ltd.* v. *The Bank of Communications*).

[[1] See *Annual Digest*, 1938–1940, Case No. 6.]

B—COMPOSITE AND DEPENDENT STATES AND TERRITORIES

III.—Protected States and Protectorates. Dependent States

Dependent States—The Philippines—Prior to Independence—Relationship to United States—Foreign Country *vis-à-vis* United States—Vessels Flying Philippine Flag—Exemption from Income Taxation by United States of Earnings of Such Vessels—The Law of the United States of America.

M/V *Nonsuco*, Inc., *et al. v.* Commissioner of Internal Revenue.

United States, Tax Court. November 26, 1954.

Court of Appeals, Fourth Circuit. June 5, 1956.

The Facts.—The plaintiffs were two corporations organized under the laws of the Commonwealth of the Philippines in 1939 and 1940. Each of the two corporations (hereafter referred to as taxpayers) owned and operated one ship which was documented under the laws and flew the flag of the Philippines and was operated in international trade. The taxpayers contended that under section 231 (d) (1) of the Internal Revenue Code of 1939 (53 Stat. 78), as amended (the text of which is quoted in the *Held*, below), they were entitled to the exemption of the earnings of the vessels from the time of the approval of the Philippine Act approved on June 10, 1941, granting a reciprocal exemption to vessels of the United States, until October 21, 1946. The Republic of the Philippines was granted its independence by the United States on July 4, 1946. The Commissioner of Internal Revenue denied that the taxpayers were entitled to the exemption on the grounds that the Philippine statute did not not grant a reciprocal exemption and that the Philippines was not a " foreign country " within the meaning of section 231 (d) (1). The taxpayers appealed to the Tax Court of the United States.

Held (by the Tax Court): that the taxpayers were not entitled to the exemption. While a reciprocal exemption was provided by the law of the Philippines, the Philippines was not a foreign country but a possession of the United States prior to its independence on July 4, 1946. [Report: 23 T.C. 361.]

The taxpayers petitioned for review of the decision of the Tax Court.

Held (by the Court of Appeals): that the judgment of the Tax Court must be reversed. The Philippines was, for the purposes of the tax laws of the United States, a foreign country during the period from 1941 to 1946. The Philippines functioned as an independent country, except as to those matters as to which the United States retained jurisdiction. Since the purpose of section 231 (d) (1) of the Internal Revenue Code of 1939 was to avoid double taxation, account must be taken of the fact that the Philippines had a separate Government exercising powers of taxation over commerce and that the denial of the exemption to Philippine vessels would have the effect of giving a less favourable status to such ships than to those of other countries.

The Court said : " The Tax Court sustained the Commissioner's position, however, that the Philippines were not a foreign country within the meaning of section 231 (d) (1) prior to the independence of the islands on July 4, 1946, and allowed exemption of the earnings of the vessels only for the period subsequent to that date. In this we think that the Tax Court failed to follow the realistic approach to the problem which it had followed on the question of the equivalence of the exemptions and that it gave an interpretation to section 231 (d) (1) justified neither by the language nor the spirit of that section when it is considered, as it must be, in connection with other legislation and the evident purpose which Congress had in mind in its passage. That section is as follows:

> '§ 231. *Tax on foreign corporations* . . .
>
> '(d) *Exclusions.* The following items shall not be included in gross income of a foreign corporation and shall be exempt from taxation under this chapter:
>
> '(1) *Ships under foreign flag.* Earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States.'

" The question is not whether the Philippines, at all times and for all purposes, were to be deemed a country foreign to the United States prior to their independence on July 4, 1946, Proclamation No. 2695, U.S. Code Cong. Service 1946, p. 1731,[1] but whether vessels flying the flag of the Philippines and documented under their laws should be deemed to be documented under the laws of a foreign country[2] within the meaning of the exclusion above quoted from the section 231 (d) of the Internal Revenue Code of 1939. In this connection it should be noted that at the time of the adoption of the Code the Philippines and the United States had long had separate tax laws, subject to the control of their respective legislatures, separately administered by their respective governmental agencies, with revenues accruing to their respective governments. *Robinette* v. *Commissioner*, 6 Cir., 139 F.2d 285. Since 1920, Philippine ships have been registered and documented under the laws of the Philippines and not under the laws of the United States. They have flown the flag of the Philippines and have been treated as foreign vessels for all purposes. And the Philippines have been treated as foreign territory within the purview of our shipping laws. See 46 U.S.C. §§ 877, 883, 1222, 1241.

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[1] Cf. *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 57 S.Ct. 764, 81 L.Ed. 1122; *Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 22 S.Ct. 59, 46 L.Ed. 138; *Downes* v. *Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088; *De Lima* v. *Bidwell*, 182 U.S. 1, 21 S.Ct. 743, 45 L.Ed. 1041.

[2] As said by Chief Justice Hughes in *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 5–6, 52 S.Ct. 275, 277, 76 L.Ed. 587: " The word ' country ', in the expression ' foreign country,' is ambiguous. It may be taken to mean foreign territory or a foreign government. In the sense of territory, it may embrace all the territory subject to a foreign sovereign power. When referring more particularly to a foreign government, it may describe a foreign state in the international sense, that is, one that has the status of an international person with the rights and responsibilities under international law of a member of the family of nations; or it may mean

" While the treatment accorded the Philippines both in the tax laws and shipping laws would indicate without more that Philippine vessels should be held to be embraced within the exclusion of the section under consideration, this becomes even clearer when it is remembered that following the Philippine Independence Act of March 24, 1934, c. 84, 48 Stat. 456, the Philippines adopted their own Constitution in 1935 and since then have functioned as an independent country except with respect to a few matters necessitated by the protectorate exercised by the United States pending complete independence. With respect to their status during this period, the Supreme Court, speaking through Chief Justice Stone, in *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 676–678, 65 S.Ct. 870, 882, 89 L.Ed. 1252, has said:

> ' The new Philippine Constitution was adopted on February 8, 1935, and the new government under it was inaugurated on November 14, 1935. By the provisions of the Independence Act, the United States retained certain powers with respect to our trade relations with the Islands, with respect to their financial operations and currency, and the control of their foreign relations. The power of review by this Court of Philippine cases is continued and extended to all cases involving the Constitution of the Commonwealth of the Philippine Islands. § 7 (6), 48 U.S.C.A. § 1237 (6). Thus by the organization of the new Philippine government under the constitution of 1935, the Islands have been given, in many aspects, the status of an independent government, which has been reflected in its relations as such with the outside world . . .
>
> ' The Independence Act, while it did not render the Philippines foreign territory, *Cincinnati Soap Co.* v. *United States*, *supra*, 301 U.S. 318–320, 57 S.Ct. 769, 81 L.Ed. 1122, treats the Philippines as a foreign country for certain purposes. In 48 U.S.C. § 1238 (a) (1), 48 U.S. C.A. § 1238 (a) (1), it established immigration quotas for Filipinos coming

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a foreign government which has authority over a particular area or subject-matter, although not an international person but only a component part, or a political subdivision, of the larger international unit. The term ' foreign country ' is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation." See also *Delany* v. *Moraitis*, 4 Cir., 136 F.2d 129, 131.

to the United States, as if the Philippines were a separate country, and in that connection extended to Filipinos the immigration laws relating to the exclusion or expulsion of aliens. It also provided, 48 U.S.C. § 1238 (a) (2), 48 U.S.C.A. § 1238 (a) (2), that citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For purposes of 8 U.S.C. §§ 154 and 156, 8 U.S.C.A. §§ 154, 156, relating to deportation, the Philippine Islands are declared to be a foreign country. 48 U.S.C. § 1238 (a) (4), 48 U.S.C.A. § 1238 (a) (4). Foreign service officers of the United States may be assigned to the Philippines, and are to be considered as stationed in a foreign country. 48 U.S.C. § 1238a, 48 U.S.C.A. § 1238a. And the Independence Act, § 6, 48 Stat. 456, 460, provides that " when used in this section in a geographical sense, the term ' United States ' includes all Territories and possessions of the United States, except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam." As we have said, the Philippines have frequently dealt with other countries, as a sovereignty distinct from the United States.'

" When we consider the purpose of the exclusion clause, we think it perfectly clear that Philippine vessels should be held to be embraced within its provisions. The purpose of the clause (first enacted as 213 (b) (8) of the Revenue Act of 1921, 42 Stat. 239) was ' to encourage the international adoption of uniform tax laws affecting shipping companies, for the purpose of eliminating double taxation, ...' S.Rep. 275, 67th Cong. 1st Sess. p. 14. A foreign country within the scope of this purpose would be one which exercised, as did the Philippines, the power of taxation over the earnings of ships engaged in commerce. Congress was not dealing with such questions as were presented in the Insular cases, but with the exercise of the power of taxation by those who were exercising that power and was attempting to eliminate the evil of double taxation by holding out the proffer of a reciprocal exemption. As was said by Chief Justice Hughes in *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 7–10, 52 S.Ct. 275, 277, 76 L.Ed. 587, which dealt with credit for income taxes paid to a foreign country:

' In the instant case, the question is one of credit for income taxes " paid to any foreign country." The word " country " is manifestly used in the sense of government. And to decide what government fits the description, whether only that of a foreign power which may be considered an international person, or that of a political entity which, although not an international person, levies and collects income taxes which may be the subject of the intended credit, it is necessary to consider the object of the enactment and to construe the expression " foreign country " so as to achieve, and not defeat, its aim. We think that the purpose of the statute is clear. The fact that the provision is for a credit to the domestic corporation, against income taxes payable here, of income taxes " paid during the same taxable year to any foreign country," itself demonstrates that the primary design of the provision was to mitigate the evil of double taxation. . . .

'In effectuating these purposes, it is manifest that the controlling consideration was the fact that the income tax was paid to a foreign government competent to lay the tax, and not the international status of that government. The burden upon the domestic corporation was the same whether the foreign government had international standing or was a lesser political entity which nevertheless had authority to impose the exaction upon the corporation or its subsidiary. And if credit was to be allowed here by reason of the payment of the income tax abroad, it made no difference to the Government of the United States whether the payment abroad was made to the one sort of foreign government or the other. The reasons underlying the allowance of the credit were applicable in either case.'

" There was just as much reason to extend the offer of a reciprocal exemption to the Philippines as to any other country exercising the power to tax shipping and, in truth, a stronger reason; for we were exercising a benevolent guardianship over the development of the Philippines and were doing everything within our power to foster the development of their trade and commerce. As said by Mr. Justice Murphy (who had served as Governor General and as United States High Commissioner of the Philippines) in his concurring opinion in *Hooven & Allison Co.* v. *Evatt*, supra, 324 U.S. at pages 692–693, 65 S.Ct. at page 889:

'We have as a nation exhibited an ideal and a selfless concern for the well-being of the Philippine people, a concern that has been deepened by the devastation that war has brought to their land. Since the Islands were ceded to us, we have at once fostered their economic development through preferential trade agreements and encouraged their desires for freedom and independence. Their industries and their agriculture have gradually been adjusted in contemplation of their eventual sovereign independence. But war has stricken their land and their peoples. Their growing economy has been largely decimated by over three years of ruthless invasion and occupation. Filipinos in countless numbers have yielded up not only their property but their lives and their liberties. Their economic and social structure has fallen about them in ruins.

'Now, with the Islands liberated, our moral and legal obligations are greater than ever before. Our responsibility for providing urgent relief and rehabilitation has been readily assumed. But the more complex and difficult duty of helping to reconstruct the Philippines economic structure remains to be fulfilled. It is clear that the Philippines cannot safely be thrown into the world market and left to shift for themselves. For the foreseeable future, at least, their economy must be closely linked to that of the United States, without either country abandoning or retreating from the common ideal of independence for the Philippines.

'Accordingly it is my view that if it is reasonably possible to do so we should avoid a construction of the term " imports," as used in Article I, section 10, clause 2 of the Constitution, that would place Philippine products at a disadvantage on the American market to the advantage of products from other countries or that might be a means of impeding the economic rehabilitation of the Philippines.'

" The fact that Congress, in enacting the Revenue Act of 1921, made special provision in section 222 (a), 42 Stat. 249, for the credit of taxes paid to a possession of the United States is no sufficient reason for not treating Philippine vessels as vessels documented under the laws of a foreign country, especially after the adoption of the Philippine Constitution of 1935 and the assumption of quasi-sovereign powers by the islands, with complete control of the taxing power as well as of shipping. No sensible reason has been advanced, and none suggested itself, as to why Congress should have intended a discrimination against the commerce of the Philippines as compared with the commerce of the Republic of Panama, for example, or any other country exercising the taxing power over commerce. Even if such an intention could be inferred at the time of the passage of the Act of 1921, when the Philippines were a mere possession, it could not reasonably be inferred after the islands had become in 1935 an independent country in practically all respects, subject only to a limited control for the purpose of its protection. The section here relied on was passed in 1939 and the intent of Congress should be judged as of that time. If, however, we go back to the act of 1921 to judge the purpose and intent of Congress, we think it clear that the shipping of a nation occupying the status that the Philippines occupied after 1935 must have been embraced within the language used. As said in *De Lima* v. *Bidwell*, 182 U.S. 1, at page 197, 21 S.Ct. 743, at page 753, 45 L.Ed. 1041: ' While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope.'

" For the reasons stated, the judgment appealed from will be reversed."

[Report: 234 F.2d 583.]

NOTE.—The present case shows that prior to its full independence the Philippines was treated by the American courts as a foreign country. Although it is mainly of historical importance, the case raises some questions of international personality at the intermediate stage prior to independence. It is also of interest as an instance of a dependent territory flying a separate flag.

In *Madrona Banez* v. *Boyd et Al.*, 236 F.2d 934 (9th Cir. 1956), it was *held* that a native of the Philippines who entered the United States without a visa in 1946 was a national of the United States but, for the purposes of the immigration laws, was to be treated as if he were an alien, pursuant to section 8 (a) (1) of the Philippine Independence Act of 1934 (48 Stat. 462); after 1934, the Philippine Islands were " foreign " for immigration purposes.

The plaintiffs in *Vallejos et Al.* v. *Barber*, 146 F. Supp. 781 (N.D. Calif. 1956), were natives of the Philippine Islands who had left the Philippines before May 1, 1934, the effective date of the Philippine Independence Act, and had arrived in the United States after the effective date of the Act. They had thus departed from the Philippine Islands as nationals of the United States and arrived in the United States as aliens under the provisions of that Act. They were *held* not to be " immigrants " requiring immigration visas, as that term was employed in the Immigration Act of 1934, on the ground that they had not departed from a place outside the United States.

In *Petition for Naturalization of Willess*, 146 F.Supp. 216 (D. Hawaii 1956), Wake Island was *held* to be " abroad " as to the United States for the purpose of the petition for naturalization of a woman whose eligibility for naturalization turned on her being married to an American citizen " regularly stationed abroad ".

Dependent Territories—Colonies—Status of Belgian Congo.

See p. 191 (*The Belgian Congo* v. *Montefiore*).

IV.—Mandated and Trust Territories

i.—Sovereignty over Mandated and Trust Territories. Status of Mandated and Trust Territories

Composite and Dependent States and Territories—Trust Territories—Status of—Trust Territory of the Pacific Islands—Residence in—Whether " Residence in the United States " for Purposes of Naturalization—The Law of the United States of America.

Application of Reyes.

United States, District Court, District of Hawaii. April 12, 1956.

The Facts.—This was a petition by a native of the Philippines for naturalization as a citizen of the United States. The petitioner had come to Hawaii, a territory of the United States, in 1946 and had thereafter continuously maintained a residence in that territory. In 1952 and 1953 he was absent from Hawaii for a period of fourteen months while he was employed on Kwajalein Island. That island was within the Trust Territory of the Pacific Islands, of which the United States had been designated the Administering Authority pursuant to the Trusteeship Agreement for the Former Japanese Mandated Islands, approved by the Security Council of the United Nations on April 2, 1947 (61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N. T.S. 189).

The Designated Examiner of the United States Immigration and Naturalization Service recommended that the petition be refused because section 316 of the United States Immigration and Nationality Act (66 Stat. 242, 8 U.S.C. § 1427) requires continuous residence within the United States for at least five years immediately preceding naturalization and provides that an unbroken absence of more than one year destroys the continuity of such residence.

The petitioner contended that for the purposes of naturalization Kwajalein Island should be considered a part of the United States on the ground that the United States exercised control over the Trust Territory, and that the petitioner therefore had not been absent from the United States during any part of the statutory period.

Held: that the petition for immigration must be denied. The Immigration and Nationality Act of 1952 and proclamations of the President of the United States indicated that, for purposes of naturalization, a trust territory such as the Pacific Islands was not considered as part of the United States.

The Court said: " Petitioner has attempted to establish that Kwajalein should be considered part of the United States for purposes of naturalization, and that he was, therefore, never ' absent ' from the United States. Kwajalein was formerly part of the Japanese mandated group under the League of Nations. Following World War II, the Marshall, Caroline, and Marianas Islands (excepting Guam, at that time a possession of the United States) passed to the United Nations as successor to the League of Nations. On July 18, 1947, these Islands were placed under the control of the United States by a ' Trusteeship Agreement '[1] with the United Nations. The United States was designated as the ' administering authority of the trust territory ' and was given comprehensive powers over the entire area.[2] As a practical matter, it appears that the United States exercises as much power over these Islands as it does over any of its possessions, and there is merit in petitioner's claim that because of control of Kwajalein by the Navy and the entire appearance of United States domination. it should be held that petitioner was not absent from the United States.

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[1] Trusteeship Agreement for the former Japanese Mandated Islands, 61 Stat. 3301. The agreement was approved by the Security Council of the United Nations on April 2, 1947, and by the President of the United States on July 18, 1947, pursuant to authority granted by a joint resolution of Congress July 18, 1947. See also U.S. Code Cong.Service, First Session, 1947, p. 1317.

[2] Portions of the agreement are summarized below:

Article 3—The administering authority has full powers of administration, legislation, and jurisdiction over the territory and may apply, " subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements."

Article 4—Entitles administering authority to establish naval, military and air bases in the territory.

Article 9—Entitles administering authority to constitute the territory into a customs, fiscal, or administrative union with other territories under United States jurisdiction and to establish other common services between such territories.

Article 10—" The administering authority shall take the necessary steps to provide the status of citizenship of the trust territory for the inhabitants of the trust territory."

" But there are compelling reasons why Kwajalein cannot be considered as part of the United States for purposes of naturalization. Congress has declared, in the Immigration and Nationality Act of 1952, that, ' The term " United States ", . . . when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.' 8 U.S.C.A. § 1101 (a) (38). It has also defined the term ' foreign state ' as including, '. . . territories under mandate or trusteeship . . .' 8 U.S.C.A. § 1101 (a) (14).

" Also cogent is the force of the Presidential Proclamation of July 2, 1952,[1] declaring the annual quota for each quota area as authorized by the Immigration and Nationality Act of 1952.[2] The proclamation lists as area No. 58 the ' Pacific Islands (trust territory, United States administered)', with a specified quota for immigration purposes, listed in conjunction with other quota areas, such as Finland, India, Korea, Turkey, and others.

" In view of the sweeping provisions of the trusteeship agreement, it is possible that Congress had the authority to declare that the trust territory was to be considered as part of the United States for purposes of naturalization. However, it has not done so and it must be concluded that Kwajalein is not a part of the United States and that petitioner's absence operated to break the continuity of his residence."

(The Court then disposed of a further contention of the petitioner under the municipal law of the United States.)

[Report: 140 F.Supp. 130.]

Mandated Territory—Whether Included in Term " Colony "—The Law of Palestine and Israel.

See p. 284 (*Stampfer* v. *Attorney-General*).

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[1] Presidential Proclamation No. 2980, July 2, 1952, 17 F.R. 6019, 66 Stat. c36.

[2] 8 U.S.C.A. § 1151(a) and 1151(b).

iii.—Rights and Duties of the Supervisory Authority

Mandates—Supervision of—Oral Hearings—Practice of League of Nations—Mandate for South-West Africa—Continuance of Supervision by United Nations—Advisory Opinion of July 11, 1950, on Status of South-West Africa—Interpretation of—Refusal of South Africa to Submit Annual Reports—Right of Petition under League of Nations—Residuary Powers of Council of League of Nations—Functions of General Assembly of United Nations—Effectiveness of System of Supervision.

Admissibility of Hearings of Petitioners by the Committee on South-West Africa.

International Court of Justice. Advisory Opinion of June 1, 1956.

(Hackworth, President; Badawi, Vice-President; Basdevant, Winiarski, Klaestad, Read, Hsu Mo, Armand-Ugo, Kojevnikov, Sir Muhammad Zafrulla Khan, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, Judges.)

The Facts.—By a Resolution adopted on December 3, 1955, the General Assembly decided to request the Court to give an Advisory Opinion regarding the admissibility of hearings of petitioners by the Committee on South-West Africa, in the following terms:

> " *The General Assembly,*
>
> " *Having been requested* by the Committee on South West Africa to decide whether or not the oral hearing of petitioners on matters relating to the Territory of South West Africa is admissible before that Committee (A/2913/Add.2),
>
> " *Having instructed* the Committee, in General Assembly resolution 749 A (VIII) of 28 November, 1953, to examine petitions as far as possible in accordance with the procedure of the former Mandates System,
>
> " *Requests* the International Court of Justice to give an advisory opinion on the following question:
>
>> ' Is it consistent with the advisory opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the Territory of South West Africa? ' "

Previously, on July 11, 1950, the Court had rendered an Advisory Opinion on the *International Status of South-West Africa* (see *International Law Reports*, 1950, Case No. 16) in the operative part of which the Court stated as follows:

" that South-West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920;

" that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court; . . . "

The further relevant facts are stated in the Opinion of the Court as follows:

" The General Assembly having accepted the Court's Advisory Opinion of 11 July 1950, proceeded to establish, by Resolution 749 A (VIII), referred to in the request for the Opinion of the Court contained in Resolution 942 A (X), a subsidiary organ which, *inter alia*, was to ' examine . . . such information and documentation as may be available in respect of the Territory of South West Africa ', to ' examine . . . reports and petitions which may be submitted to the Committee or to the Secretary-General ', and to ' transmit to the General Assembly a report concerning conditions in the Territory . . .'. This organ is the Committee on South West Africa referred to in the question submitted to the Court for its opinion. Its functions are analogous to those of the Permanent Mandates Commission established by the Council of the League of Nations, pursuant to paragraph 9 of Article 22 of the Covenant.

" It appears from Resolution 749 A (VIII) that the Mandatory was refusing to assist in the implementation of the Advisory Opinion of the Court and to co-operate with the United Nations concerning the submission of reports and the transmission of petitions in accordance with the procedure of the Mandates System. As the Mandatory continued in its refusal to co-operate, the Committee found itself handicapped in the examination of petitions. It lacked both the Mandatory's comments on the petitions and the supplementary information which the Mandatory might have been expected to supply to the Committee directly or through its accredited representative. These were the circumstances prevailing at the time that the Committee requested the General Assembly to decide whether or not the oral hearing of petitioners by the Committee would be admissible.

" Before deciding whether the Committee should or should not be authorized to grant oral hearings, the General Assembly deemed it advisable to obtain the Opinion of the Court on the question whether the grant of oral hearings by the Committee on South West Africa would be consistent with the Advisory Opinion of the Court of 11 July 1950.

" It was in these circumstances that the question was submitted to the Court. While the question in terms refers to the grant of oral hearings by the Committee, the Court interprets it as meaning: whether it is legally open to the General Assembly to authorize the Committee to grant oral hearings to petitioners. The Court must therefore deal with the broader question as to whether it would be consistent with its previous Opinion of 11 July 1950 for the General Assembly to authorize the Committee on South West Africa to grant oral hearings to petitioners."

Held (by eight votes to five): " that it would not be inconsistent with its Opinion of 11 July 1950 for the General Assembly to authorize a procedure for the grant of oral hearings by the Committee on South West Africa to petitioners who had already submitted written petitions: provided that the General Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the Mandated Territory [and] that the grant of oral hearings to petitioners by the Committee on South West Africa would be consistent with the Advisory Opinion of the Court of 11 July 1950."

The Court said, after quoting the operative part of the Advisory Opinion of July 11, 1950 cited above: "Accordingly, the obligations of the Mandatory continue unimpaired with this difference, that the supervisory functions exercised by the Council of the League of Nations are now to be exercised by the United Nations. The organ of the United Nations exercising these supervisory functions, that is, the General Assembly, is legally qualified to carry out an effective and adequate supervision of the administration of the Mandated Territory, as was the Council of the League.

" In determining the question whether in these circumstances it would be consistent with the Opinion of the Court of 11 July 1950 for the Committee on South West Africa to grant oral hearings to petitioners, the Court must have regard to the whole of its previous Opinion and its general purport and meaning.

" In that Opinion the Court, having concluded that South West Africa is a territory under the international Mandate and that the Mandatory continues to have the obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate, as well as the obligation to transmit reports and petitions and to submit to the supervision of the General Assembly, made it clear that the obligations of the Mandatory were those which obtained under the Mandates System. These obligations could not be extended beyond those to which the Mandatory had been subject by virtue of the provisions of Article 22 of the Covenant and of the Mandate for South West Africa under the Mandates System. The Court stated, therefore, that the degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates System. Following its finding regarding the substitution of the General Assembly of the United Nations for the Council of the League of Nations in the exercise of supervision, the Court stated that the degree of supervision should conform as far as possible to the procedure followed by the Council of the League of Nations in that respect. The Court observed that these considerations were particularly applicable to annual reports and petitions.

"At the same time the Court stated that 'the effective performance of the sacred trust of civilization by the Mandatory Powers required that the administration of mandated territories should be subject to international supervision' and said: 'The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System.'

"In discussing the effect of Article 80 (1) of the Charter, preserving the rights of States and peoples under existing international agreements, the Court observed: 'The purpose must have been to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ.'

"The general purport and meaning of the Opinion of the Court of 11 July 1950 is that the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory.

"Accordingly, in interpreting any particular sentences in the Opinion of the Court of 11 July 1950, it is not permissible, in the absence of express words to the contrary, to attribute to them a meaning which would not be in conformity with this paramount purpose or with the operative part of that Opinion.

"Before proceeding further, it is necessary to refer briefly to the way in which the question of the grant of oral hearings to petitioners was dealt with during the regime of the League of Nations. The Permanent Mandates Commission had under consideration at various meetings the question of the grant of oral hearings to petitioners, both at the request of petitioners and on its own initiative. The Commission felt that in some cases oral hearings would be useful, if not indispensable, in determining whether petitions were well-founded or not. In 1926, the Commission laid the matter before the Council, but refrained from making a definite recommendation on the subject. The Council, in turn, decided that, before taking action, it should consult the Mandatory Powers. After obtaining the views of those Powers, all of whom were opposed to the grant of oral hearings on various grounds, the Council, by Resolution of March 7, 1927, decided that there was no occasion to modify the procedure theretofore followed by the Commission in regard to the question. In his Report to the Council, the Rapporteur stated that, if in any particular case the circumstances should show that it was impossible for all the necessary information to be secured by the usual means, the Council could ' decide on such exceptional procedure as might seem appropriate and necessary in the particular circumstances '. By its Resolution, the Council directed that copies of the Resolution, of the Report of the Rapporteur and of the replies of the Mandatory Powers, should be transmitted to the Permanent Mandates Commission. It is clear that oral hearings were not granted to petitioners by the Permanent Mandates Commission at any time during the regime of the League of Nations.

" The right of petition was introduced into the Mandates System by the Council of the League on January 31st, 1923, and certain rules relating to the matter were prescribed. This was an innovation designed to render the supervisory function of the Council more effective. The Council having established the right of petition, and regulated the manner of its exercise, was, in the opinion of the Court, competent to authorize the Permanent Mandates Commission to grant oral hearings to petitioners, had it seen fit to do so.

" It has been contended that the Court, in its Opinion of 11 July 1950, intended to express the view that the Mandates System and the degree of supervision to be exercised by the General Assembly in respect of the Territory of South West Africa must be deemed to have been crystallized, so that, though the General Assembly replaced the Council of the League as the supervisory organ in respect of the Mandate, it could not, in the exercise of its supervisory functions, do anything which the Council had not actually done, even if it had authority to do it. The Court does not consider that its Opinion of 11 July 1950 supports this position.

" There is nothing in the Charter of the United Nations, the Covenant of the League, or the Resolution of the Assembly of the League of April 18th, 1946, relied upon by the Court in its Opinion of 1950, that can be construed as in any way restricting the authority of the General Assembly to less than that which was conferred upon the Council by the Covenant and the Mandate; nor does the Court find any justification for assuming that the taking over by the General Assembly of the supervisory authority formerly exercised by the Council of the League had the effect of crystallizing the Mandates System at the point which it had reached in 1946.

" The Court having determined that the General Assembly had replaced the Council of the League as the supervisory organ, it was proper for it to point out that the General Assembly could not enlarge its authority but must confine itself to the exercise of such authority as the Mandates System had conferred upon the supervisory organ. The Court was not called upon to determine whether the General Assembly could or could not exercise powers which the Council of the League had possessed but for the exercise of which no occasion had arisen.

"The Court held that the obligations of the Mandatory under the Mandate continued unimpaired, and that the supervisory functions in respect of the Mandate were exercisable by the United Nations, the General Assembly replacing in this respect the Council of the League. It followed that the General Assembly in carrying out its supervisory functions had the same authority as the Council. The scope of that authority could not be narrowed by the fact that the Assembly had replaced the Council as the supervisory organ.

"Reliance has been placed upon the following sentence in the Court's Opinion of 1950:

'The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations.'

It has been suggested that the grant of oral hearings by the Committee on South West Africa to petitioners would involve an excess in the degree of supervision to be exercised by the General Assembly and that the sentence should be interpreted as intended to restrict the activity of the General Assembly to measures which had actually been applied by the League of Nations. On these grounds it had been contended that the grant of oral hearings by the Committee would not be consistent with the Court's Opinion of 1950.

"The Court will deal first with the suggestion that the grant of oral hearings to petitioners would, in fact, add to the obligations of the Mandatory and thus lay upon it a heavier burden than it was subject to under the Mandates System. The Court is unable to accept this suggestion. The Committee on South West Africa at present receives petitions from the inhabitants of the Mandated Territory and proceeds to examine them without the benefit of the comments of the Mandatory or of the assistance of its accredited representative during the course of the examination. In many cases, the material available to the Committee from the petitions or from other sources may be sufficient to enable the Committee to form an opinion on the merits of the petitions. In other cases the Committee may not be able to come to a decision on the material available to it. If the Committee cannot have recourse to any further information for the purpose of testing whether a petition is or is not well-founded, it may lead in certain cases to acceptance of statements in the petitions without further test. Oral hearings in such cases might enable the Committee to submit its advice to the General Assembly with greater confidence. If as the result of the grant of oral hearings to petitioners in certain cases the Committee is put in a better position to judge the merits of petitions, this cannot be presumed to add to the burden of the Mandatory. It is in the interest of the Mandatory, as well as of the proper working of the Mandates System, that the exercise of supervision by the General Assembly should be based upon material which has been tested as far as possible, rather than upon material which has not been subjected to proper scrutiny either by or on behalf of the Mandatory, or by the Committee itself.

" The Court will deal next with the suggestion that the statement ' the degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System ' should be interpreted as intended to restrict the activity of the General Assembly to measures which had actually been applied by the League of Nations. This could not have been the intention of the Court. Neither the Covenant of the League, nor the Mandate for South West Africa, nor the Charter of the United Nations, contains any provision which could justify such a restriction. That it cannot have been the intention of the Court to impose on the General Assembly a rigid limitation on its supervisory function is evidenced by the second part of the same sentence, according to which the degree of supervision ' should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations '. With regard to this statement, the Court said in its Opinion of 1955:[1]

' When the Court stated in its previous Opinion that in exercising its supervisory functions the General Assembly should conform " as far as possible to the procedure followed in this respect by the Council of the League of Nations ", it was indicating that in the nature of things the General Assembly, operating under an instrument different from that which governed the Council of the League of Nations, would not be able to follow precisely the same procedures as were followed by the Council. Consequently, the expression " as far as possible " was designed to allow for adjustments and modifications necessitated by legal or practical considerations.'

" The Court notes that, under the compulsion of practical considerations arising out of the lack of co-operation by the Mandatory, the Committee on South West Africa provided by Rule XXVI of its Rules of Procedure an alternative procedure for the receipt and treatment of petitions. This Rule became necessary because the Mandatory had refused to transmit to the General Assembly petitions by the inhabitants of the Territory, thus rendering inoperative provisions in the Rules concerning petitions and directly affecting the ability of the General Assembly to exercise an effective supervision. This Rule enabled the Committee on South West Africa to receive and deal with petitions notwithstanding that they had not been transmitted by the Mandatory and involved a departure in this respect from the procedure prescribed by the Council of the League.

[[1] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa* (*I.C.J. Reports*, 1955, pp. 68–78; *International Law Reports*, 1955, pp. 651–689, at p. 658).]

"The particular question which has been submitted to the Court arose out of a situation in which the Mandatory has maintained its refusal to assist in giving effect to the Opinion of 11 July 1950, and to co-operate with the United Nations by the submission of reports, and by the transmission of petitions in conformity with the procedure of the Mandates System. This sort of situation was provided for by the statement in the Court's Opinion of 1950 that the degree of supervision to be exercised by the General Assembly 'should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations'."

[Report: *I.C.J. Reports*, 1956, p. 23.]

NOTE.—Judge Winiarski, who voted in favour of the Opinion of the Court, made the following declaration:

"I regret that I am unable to accept the whole of the reasoning on which the Court has based its reply. In particular I think that as the Opinion of 1950 was not based on the idea of the United Nations as a successor in title of the League of Nations, the question of a devolution of the powers of the Council of the League of Nations to the General Assembly does not arise. I am in agreement with the minority opinion in considering that the whole structure of the Opinion of 1950 was founded on the objective elements of the situation which arose as a result of the disappearance of the League of Nations, and that that Opinion found in the General Assembly the organ qualified to exercise those functions which could not be allowed to go by default.

"I also believe that the maintenance of the previously existing situation constitutes the dominant theme of the Opinion and that the decisive test is to be found in what was formerly done, and I therefore think that any enquiry as to the extent of the powers of the Council and of the General Assembly respectively is pointless. The powers of the supervisory organ, which are determined by the continuing obligations of the mandatory Power, are at the same time duties, and it is quite natural that, conscious of its responsibilities, the General Assembly should have put to the Court the question relating thereto.

"I agree with the Court in considering that, though drafted in absolute terms, the question is to be understood as relating to the actual situation existing and I hesitate to reply to it as though this situation were normal, that is to say, as if the Mandatory were discharging its undertakings as it did under the regime of the League of Nations; the *raison d'être* of the question cannot be ignored. If then, in these circumstances, the General Assembly, in order to secure further information, grants a hearing to a petitioner, its decision cannot be held to be irregular. If, on the same basis, it should authorize the Committee, which is its organ, to grant a hearing in a particular case in its stead, I should be unable to regard such a decision, which is one for the Assembly, as conflicting with the Opinion of 1950; if, in the same circumstances, it deemed it necessary to authorize the Committee to undertake such hearings, that, while not in accordance with the former practice, would be justified if warranted by imperative considerations and if kept within reasonable limits and governed by the rule of good faith."

Judge Kojevnikov, who voted in favour of the Opinion, made the following declaration:

"While accepting the operative clause of the Advisory Opinion, I am unable to concur in certain respects with the reasoning, in particular with that part which would attribute to the Opinion a limited and conditional character, for I am of opinion that petitions may be in writing or oral, or both in writing and oral, that hearings granted to petitioners by the Committee on South West Africa are consistent with the Advisory Opinion of the Court of July 11th, 1950, and that the presentation even of oral petitions is one of the indefeasible rights of the population of the Territory of South West Africa, rights which accrue from the Covenant of the League of Nations, and still more from the Charter of the United Nations, in conformity with which this Territory should be included in the Trusteeship System of the United Nations."

Judge Sir Hersch Lauterpacht appended a Separate Opinion in the following terms:

" While I am in general agreement with the Opinion of the Court, I have concurred in it subject to reservations both with regard to the scope of the operative part of the Opinion and the reasons adduced in support of it. Moreover, I feel it my duty to elaborate in more detail certain questions relating to the main problem confronting the Court.

" I. There arises in the present case a preliminary issue which is to a large extent responsible for the division of the Court and which is connected in a significant manner with the exercise of its advisory function.

" The request for the present Advisory Opinion of the Court is stated in apparently general terms. It runs as follows: ' Is it consistent with the Advisory Opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly Resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the territory of South West Africa? ' Thus put, the question does not seem to refer to any specific situation. In view of this, it has been suggested—a suggestion to which the Court, rightly in my view, has declined to accede—that the reply of the Court must be of a general character unrelated to the events and providing no answer to the difficulty which underlay the request for the Opinion. Yet it is clear from the documents transmitted to the Court by the Secretary-General that in asking the Court for an Opinion on the question whether oral hearings of petitioners on matters relating to the territory of South West Africa are consistent with the Opinion of the Court of 11 July 1950, the General Assembly was referring not to this question in general but to one aspect of that question as it results from a particular situation. The gist of that situation is that, while the General Assembly has with practical unanimity approved the Opinion of the Court of 11 July 1950, the Union of South Africa has declined to accept it as expressing the correct legal position and that it has refused to comply with its principal obligations in respect of the supervision of the legal régime of the mandated territory of South West Africa as ascertained by the Court in its Opinion of 11 July 1950. In particular, it has declined to provide the supervising authority with annual reports and to lend its assistance by forwarding, commenting upon, or participating in the examination of written petitions submitted to the Committee on South West Africa. It is on account of that situation that the Court has been requested to give the present Advisory Opinion. So far as I am aware, no suggestion has been made from any quarter that the Committee on South West Africa is or should be entitled to grant oral hearings even if the Union of South Africa fulfils her obligations as Mandatory in the matter of annual reports and petitions. It cannot be reasonably assumed that in framing its request the General Assembly intended no more than to obtain the confirmation of a proposition which has not been disputed and which is not at issue. The General Assembly could not have intended to confine the task of the Court to an academic exercise not requiring any notable display of judicial effort.

" This being so, the Court cannot answer the question put to it without direct reference to a situation of which a complete picture is presented in the documents which have been sent to it by the Secretary-General and of which it must also otherwise take judicial notice. Moreover, that particular situation is set out in the very terms of the request for an Advisory Opinion. The request expressly refers to Resolution 749 A (VIII) of 28 November 1953 which, in its recitals, includes an account of the attitude adopted by the Union of South Africa. Even if the Court were to ignore the official documents, minutes and reports submitted to it by the Secretary-General, the wording of the request, in embodying Resolution 749 A (VIII), must be held to give, in considerable detail, a picture of the problem confronting the General Assembly. It is clear, therefore, that there is no warrant in the present case for extracting from the wording of the request for the Opinion of the Court all possible element of generality and abstraction with the object of producing an answer which is entirely academic in character.

" There occurs in the Advisory Opinion of 28 May 1948 on the *Conditions of Admission of a State to Membership in the United Nations* a passage which, when read in isolation, seems to give support to a view contrary to that here advanced. In that case the Court said: ' It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances.' (*I.C.J. Reports 1947–1948*, p. 61.) That passage seems to lend colour to the suggestion that the Court ought also in the present case to answer the question put to it without reference to the circumstances which prompted the General Assembly to make the request. However, on reading the relevant paragraph as a whole it is clear that the passage quoted is not germane to the present issue. The Court was on that occasion concerned with the objection that ' the question put [to it] must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court '. The Court rejected that contention on the ground that it ' cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision ' and that ' it is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body '. There followed the sentence quoted at the beginning of this paragraph. It will thus be seen from this bare recital that the passage in question is not relevant to the issue now before the Court.

" At the same time, while I am in agreement with the present Opinion of the Court as to this aspect of the matter, I do not consider that the question put to it by the General Assembly can accurately be answered by way of a simple affirmative. The difficulty arises from the fact that the General Assembly, although actually desirous of an answer of the Court bearing upon a specific situation, cast its request in an apparently general form unrelated to that situation. This being so, a bare affirmative answer does not seem to me to meet the exigencies of the case. It is a matter of common experience that a mere affirmation or a mere denial of a question does not necessarily result in a close approximation to truth. The previous practice of the Court supplies authority for the proposition that the Court enjoys considerable latitude in construing the question put to it or in formulating its answer in such a manner as to make its advisory function effective and useful. Thus, for instance, in the *Jaworzina* case (Series B, No. 8, p. 50) the Court amplified the question submitted to the Court. Although the request for an Advisory Opinion in that case seemed to be confined to the frontier region of Spisz, the Court came to the conclusion that it must express an opinion on the other parts of the frontier in so far as the delimitation of the frontiers in the entire region may be interdependent. In the case concerning the *Competence of the International Labour Organisation*, it restated and limited the question put to it (Series B, No. 3, p. 59). In the Advisory Opinion on the *Interpretation of the Greco-Turkish Agreement*, the Court held that as the request for its Opinion did not state exactly the question upon which the Opinion was sought, ' it is essential that it should determine what this question is and formulate an exact statement of it ' (Series B. No. 16, p. 14). In the field of the contentious procedure the previous jurisprudence of the Court as formulated in its Judgment No. 11 on the *Interpretation of Judgments Nos. 7 & 8* (pp. 15, 16) contains authority for the proposition that the Court, for the purpose of the interpretation of its Judgments—a matter of some importance for the purposes of the present Advisory Opinion designed to interpret a previous Opinion—does not consider itself as bound simply to reply ' yes ' or ' no ' to the propositions formulated by the parties and that ' it cannot be bound by formulae chosen by the Parties concerned, but must be able to take an unhampered decision '.

" Undoubtedly it is desirable that the request for an Advisory Opinion should not, through excess of brevity, make it necessary for the Court to go outside the question as formulated. Reference may be made in this connection to suggestions bearing upon possible developments in the procedure followed by the General Assembly in making requests for an Advisory Opinion of the Court (see Sir Gerald Fitzmaurice in *Transactions of Grotius Society*, 38 (1952), p. 139). However, the absence of the requisite degree of precision or elaboration in the wording of the request does not absolve the Court of the duty to give an effective and accurate answer in conformity with the true purpose of its advisory function. For these reasons I consider that, having regard to the apparently general form in which the request for the Opinion is framed, the Opinion of the Court in the present case could not properly be couched in terms of ' yes ' or ' no ' but ought to have been given in relation both to the specific situation underlying the request for the Advisory Opinion and to the powers of the Committee on South West Africa irrespective of that situation. An answer which concentrates on only one of these two aspects may well be such as either to ignore the true issue before the Court or to open the door for yet another interpretative Opinion.

" It may be convenient if, in order to illustrate the above aspect of the present Separate Opinion, I reverse the customary order and give my own version as to what ought to be the answer of the Court in the present case:

" (1) It may or may not be consistent with the Advisory Opinion of 11 July 1950 for the Committee on South West Africa to grant oral hearings to petitioners on matters relating to the territory of South West Africa.

" (2) In circumstances in which there is present the requisite co-operation on the part of the Mandatory complying with his obligation to send reports and transmit petitions to the supervising authority as envisaged in the Opinion of 11 July 1950, it is not consistent with that Opinion to grant oral hearings to petitioners.

" (3) It is consistent with the Advisory Opinion of 11 July 1950 for the Committee on South West Africa to grant oral hearings to petitioners from that territory whenever, and so long as, owing to the absence of such co-operation on the part of the Mandatory, the Committee feels constrained, in order to fulfil the duty entrusted to it by the General Assembly, to use sources of information other than those which would be normally available to it if the Mandatory were willing to assist the Committee in obtaining information in accordance with the procedure as it existed under the League of Nations.

" It will be seen that on the main issue, as formulated under (3), my view is substantially identical with that of the operative part of the Opinion of the Court. I differ from it inasmuch [as], in consequence of the generality of its answer, the latter may be interpreted as meaning that the Committee on South West Africa is entitled to grant oral hearings even if there is present the necessary co-operation on the part of the Union of South Africa. Any such finding would, in my view, be unwarranted and inconsistent with the Opinion of 11 July 1950.

" II. I now propose to examine the main substantive question which is relevant to the answer of the Court, namely, whether oral hearings are consistent with that qualifying clause of its Opinion of 11 July 1950 which laid down that ' the degree of supervision to be exercised by the General Assembly should not . . . exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations '. That qualifying clause was in the nature of an elaboration—a necessary elaboration—of the governing consideration which underlay that Opinion, namely, that in the absence of a new arrangement agreed to by the Union of South Africa her obligations and her position in the matter of supervision were, in principle, to continue unaltered. No other object can properly be attributed to that qualifying clause. In particular, no intention can reasonably be imputed to the Court to crystallize in absolute terms and in every detail the degree of supervision and the procedure obtaining under the Mandates System. The object was to preserve the degree and the procedure of supervision not as an end in itself or because of any immutable virtue inherent in it, but merely as a means of obviating an extension or diminution of the obligations of the Union of South Africa as a Mandatory. If, as I believe to be the case, the grant of oral hearings does not, upon examination of the entire position ensuing from the attitude of the Union of South Africa, result in any addition to its obligations, then the issue of crystallizing the degree and procedure of supervision cannot properly be deemed to arise.

" So far as the language of the above-mentioned qualifying clause is concerned, I have come to the conclusion that normally, i.e., so long as there are available the regular sources of information through annual reports and petitions transmitted by the Union of South Africa in accordance with the Opinion of 11 July 1950, the grant of oral hearings to petitioners would exceed the degree of supervision which applied during the Mandates System and that it would not conform to the procedure followed in this respect, i.e., in the matter of supervision, by the Council of the League of Nations. Obtaining of information through oral hearings results in a degree of supervision more stringent than that implied in the system of written petitions. Oral hearings were not permitted under the system applied by the Council of the League of Nations. They were expressly disallowed by it on repeated occasions. As will be submitted later on, that attitude of the Council must be viewed in the light of the circumstances which explained its refusal to authorize oral hearings. However, these circumstances, although they are relevant to the more general issue now before the Court, do not alter the fact that oral hearings found no place in the procedure of supervision as applied under the Mandates System. I have little doubt that this would have been the answer—in the nature of a simple and obvious *constatation*—if that question had been asked during the existence of the League of Nations, at the time of its formal demise in 1946, or when the Advisory Opinion of the Court was given in 1950.

" Neither have I found it possible to rely to any substantial extent on the view that although the Council of the League did not permit and although it expressly rejected the procedure of oral hearings, it was *entitled* to grant oral hearings by virtue of its inherent powers in the matter of supervision and that these powers passed from the Council of the League of Nations to the General Assembly of the United Nations in conformity with the Opinion of the Court of 11 July 1950. Any devolution of powers in this respect could take place only subject to the governing rule as laid down in that Opinion, namely, that the degree of supervision by the General Assembly should not exceed that applied under the Mandates System. I find if difficult to accept as a substantial ground for the present Opinion of the Court an interpretation which construes that qualifying rule as referring not necessarily to the system which actually applied but to one which could or might have been applied in certain circumstances. The doctrine of implied powers of the Council might, if resorted to, render meaningless—to a large extent—the rule that there must be no excess of supervision. As the Council of the League, in the exercise of its alleged inherent powers, could introduce any means of supervision not patently inconsistent with the mandate, no means of supervision thus introduced by the General Assembly could conceivably be in excess of the supervision ' applied ' under the Mandates System. I cannot accept any such interpretation of the Advisory Opinion of 1950 which may go a long way towards reducing its principal qualifying provision to a mere form of words. The word ' applied ' in the qualifying passage, quoted above, of the Opinion of 1950 means ' actually ' (and not ' potentially ') applied just as the words ' procedure followed in this respect by the Council ' mean the prodecure as actually followed and not as it might have been followed.

" It may also be borne in mind that there is a distinct element of unreality in relying, in this and in other matters, on the inherent powers of the Council of the League. Such powers, if any, were powers not of an ordinary legislature or executive proceedings by a majority vote. They were powers of a body acting under the rule of unanimity scrupulously observed. There was, as a matter of reasonable estimate, little prospect of the Council, which included the principal Mandatory Powers as its Members, decreeing by an unanimous vote the authorization of oral hearings which encountered the emphatic opposition of these Powers. There is accordingly no persuasive merit in the argument which relies on inherent powers whose exercise hung on the slender thread of unanimity in circumstances such as these.

" While I am of the view that in normal circumstances the grant of oral hearings to petitioners would result in exceeding the degree of supervision as actually applied under the Mandates System and that it would not conform with the procedure followed in this respect by the Council of the League, I believe that both the excess and the departure are of limited compass. This fact, although it does not affect my answer to the more limited aspect of the question here examined, has a bearing upon what I consider to be the proper basis of the Opinion of the Court.

" With regard to degree of supervision, it is difficult to deny that oral hearings, as compared with written petitions, result to some extent in exceeding the degree of supervision obtaining under the League of Nations. In so far as oral hearings accompanied by a detailed examination of petitioners add to the reality and the effectiveness of the scrutiny of the conduct of the administering authority—and it is difficult to deny that they do so—they increase the degree of supervision as compared with a system which knows of no oral hearings of petitioners. It has been suggested that as oral hearings may disclose the spurious or fraudulent nature of some petitions, such hearings are to the advantage of the Mandatory and that they do not therefore increase his obligations in the matter of supervision. This argument I find unconvincing. It assumes that fraudulent petitions are the rule, and not the exception.

" Similar considerations apply to the question whether oral hearings constitute a departure from the procedure obtaining under the League of Nations. By and large, oral hearings before the Mandates Commission were not admissible under the procedure of the League of Nations and, in fact, they were never resorted to. On the face of it, recourse to oral hearings would therefore constitute a departure from the procedure of the Mandates Commission and the Council of the League of Nations.

"Admittedly, the above findings ought to be qualified by reference to certain factors which suggest that the departure consisting in the admission of oral hearings is—although real—less radical than appears at first sight. In the first instance, although the Mandates Commission, in compliance with the attitude of the Council of the League, did not grant oral hearings, that practice was not expressive of its view of the usefulness and of the necessity, in some cases, of relying on that procedure. The record shows that the Mandates Commission felt itself free to approach the Council on future occasions with a view to obtaining a modification of its attitude. Secondly, although the Commission as such did not grant oral hearings, its members and its Chairman, in their individual capacity, did in fact grant oral hearings to petitioners in private interviews outside the meetings of the Commission. Although subsequently some fine psychological distinctions were made between the minds of the members of the Commission as influenced outside its meetings and as formed inside the Commission, the reality of that distinction is limited. Thirdly, the refusal of the Council of the League of Nations to authorize oral hearings did not bear any mark of finality. In stating repeatedly that there was no reason, on the occasions before it, to depart from the previous practice, the Council left the door open for a modification of its practice in exceptional circumstances. It is not certain to what extent such possible modifications included the admissibility of oral hearings. In the report accompanying the Resolution approved by the Council on the last occasion when it declined to authorize oral hearings, it was stated that if in any particular circumstances it should be impossible for all the necessary information to be secured with the assistance of the Mandatory Power, the Council could 'decide on such exceptional procedure as might seem appropriate and necessary in the particular circumstances'. (Report approved on 7th March 1927.) It is possible—we cannot put it higher than that—that, having regard to the circumstances which brought about the Resolution, the Council, in referring to 'such exceptional procedure', was referring to oral hearings. The particular situations, referred to in the Resolution, may fairly be assumed to arise when, owing to an attitude of total non co-operation on his part, no assistance whatsoever is forthcoming from the Mandatory. Fourthly, it appears from the replies which the Mandatory Powers gave in 1926 and in which they rejected the principle of oral hearings that one of the main reasons for their attitude was the assumption of the continuing co-operation and assistance on the part of the Mandatory. It is noteworthy that throughout the existence of the League of Nations there were no instances of a Mandatory Power refusing to supply information with regard to a complaint brought before the Mandates Commission. (In the case of the Bondelzwarts rebellion, which has been referred to as an instance of that nature, although the Government of South Africa refused to accept and comment on a report of a local commission of enquiry, the South African administrator of the territory in question was questioned at length by the Mandates Commission in the presence of the South African representative and submitted a detailed memorandum on the subject of the complaint (*Permanent Mandates Commission, Minutes of Third Session*, 1923).)

"When, therefore, it is said that oral hearings did not exist under the League and that recourse to them by the Committee on South West Africa would be a departure from that practice, this statement—although strictly true—is a simplification of the situation. This is so not only because the exclusion of the oral hearings was less rigid than cursory examination seems to indicate. This is so mainly because the exclusion of oral hearings was a practice adopted within the orbit of the normal operation of other aspects of the machinery of supervision. These have now ceased to operate in consequence of the attitude adopted by the Union of South Africa. To put it in different words, the departure from the legal procedure involved in the system of oral hearings is substantial only if viewed against the background of the situation as it obtained during the existence of the League when reports and petitions were regularly transmitted by the Mandatory. The departure is less drastic when viewed in the light of the cessation of that system as the result of the attitude of non co-operation as adopted by South Africa. For this reason there is no warrant for treating the practice under the League of Nations as being so unequivocal and decisive as to rule out all other factors of a legal or practical nature.

" The above considerations do not decisively affect my answer to the general question whether oral hearings are consistent with the Court's Opinion of 1950. That question, when answered in the abstract—i.e., without reference to the existing situation underlying the request for the Advisory Opinion —must be answered in the negative. However, as already explained, it is not open to the Court to confine itself to an answer in the abstract. For this reason these considerations are of some indirect importance for the specific question as to whether oral hearings are consistent with the Opinion of 1950 having regard to the actual situation in respect of the territory of South West Africa.

" III. As stated, if the Court were not confronted with a situation created by the attitude of the Government of South Africa and it if were merely called upon to reply in the abstract to the question put to it, I would feel bound to answer that the grant of oral hearings constitutes a sufficient addition to the degree of supervision and that it departs sufficiently from the procedure obtaining under the League of Nations to bring it within the two restrictive clauses, referred to above, of the Opinion of 11 July 1950. However, this is not the situation with which the Court is faced. The Court is now called upon to answer not an abstract question, but—primarily— the question as to the consistency of oral hearings with its Opinion of 11 July 1950 in a situation in which the two positive dispositions of that Opinion for securing the international supervision of the Territory have become inoperative. These are the provisions, repeatedly affirmed in the Opinion, referring to the obligation of the Mandatory Power to submit annual reports and to transmit petitions from the inhabitants of the Mandated Territory. They are the basic provisions whose place as such must be kept in mind. For this reason any preoccupation with the two limitative clauses of the Opinion ought not to be allowed to overshadow its main purport. There has been a tendency to describe these limitative clauses as the basic provisions of the Opinion of 11 July 1950. Any such emphasis distorts that Opinion.

" It is submitted that in answering the question put to it against the background of the fact that the two basic provisions of the operative part of its Opinion of 1950 are in abeyance owing to the attitude adopted by the Union of South Africa, the Court must be guided by established principles of interpretation and the applicable general principles of law.

" In the first instance, in accordance with a recognized principle of interpretation, its Opinion of 11 July 1950 must, like any other legal text, be read as a whole. It must be read as a comprehensive pronouncement providing for the continuation of the administration and the continued supervision, by the United Nations, of the administration of South West Africa as a Mandated Territory. All other dispositions, injunctions and qualifications of the Opinion of 11 July 1950 must be regarded as subservient to that overriding purpose. The principal means for fulfilling that purpose—namely, annual reports supplied by the Mandatory and written petitions transmitted, commented upon and explained by him before the supervising body—which were in operation under the Mandates System are now in abeyance owing to the attitude adopted by the Union of South Africa. If the Opinion of 11 July 1950 is read as a whole, then it is impossible, without destroying its effect, to maintain fully and literally provisions qualifying the operation of a system whose main characteristics have become inoperative. It seems unreasonable to uphold fully and literally the limitations of a rule after the possibility of giving effect to the rule itself has disappeared. To do that is to elevate the exception into a rule and to reduce the governing rule to a nullity. A court of law cannot give its sanction to any such simplification of logic. Neither can it avoid its judicial duty by declaring that only a political or legislative body is competent to resolve the conflict which has arisen, as the result of the action of a party, between the overriding purpose of the instrument and its individual provisions and limitations. To resolve that conflict, in the light of the instrument as a whole, is an essential function of a judicial tribunal.

" In particular, if we act on the principle that the Opinion of 11 July 1950 must be read and interpreted as a whole, then it is necessary to apply that principle to the interpretation of that clause of that Opinion which lays down that the degree of supervision must not exceed that obtaining under the Mandates System. That clause, properly interpreted, does not rigidly and automatically apply to each and every aspect of supervision. If, owing to the attitude of the Government of South Africa, the degree of supervision as applied under the Mandates System is in danger of being severely reduced with regard to the principal aspects of its operation, it is fully consistent with the Opinion of the Court of 11 July 1950 that in some respects that supervision should become more stringent provided that it can be said, in reason and in good faith, that the total effect is not such as to increase the degree of supervision as previously obtaining. It is in accordance with sound principles of interpretation that the Court should safeguard the operation of its Opinion of 11 July 1950 not merely with regard to its individual clauses but in relation to its major purpose. This is, in the present context, the meaning of the principle that that Opinion must be interpreted as a whole. The question is not whether the admission of oral hearings of petitioners implies an excess of supervision with regard to this particular means of supervision. The decisive question is whether, owing to the situation brought about by the Union of South Africa, oral hearings of petitioners would result in an excess of supervision as a whole. It may be admitted that the procedure of oral hearings of petitioners connotes in itself a degree of supervision of a stringency greater than that obtaining in the matter of petitions under the Mandates System. But if, as the result of the attitude of the Union of South Africa, the degree of supervision is substantially reduced in other respects, then the total effect of the departure here contemplated will not be such as to result in exceeding the degree of supervision as a whole. On the contrary, however effective oral hearings of petitioners may be, they are unlikely to restore to the procedure of supervision the effectiveness of which it is being deprived as the result of the attitude of non co-operation on the part of the Union of South Africa. Thus viewed, the authorization of oral hearings is no more than a specific application of the principle that a legal text must be interpreted as a whole.

" The second principle of law of general import in the present case is connected with the nature of the régime of the territory of South West Africa as declared in the Opinion of 11 July 1950. Inasmuch as that Opinion laid down, by reference to the Covenant of the League of Nations and the Charter of the United Nations, the status of South West Africa—a régime in the nature of an objective law which is legally operative irrespective of the conduct of the Union of South Africa—that status must be given effect except in so far as its application is rendered impossible, in terms of its general purpose, having regard to the attitude adopted by the Union. To that extent there are permissible such modifications in its application as are necessary to maintain—but no more—the effectiveness of that status as contemplated in the Court's Opinion of 1950. It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument—not to change it.

" Consequently, there can be no question here of the Union of South Africa having been divested, owing to the attitude adopted by her, of any safeguards which the Opinion of 11 July 1950 provided in her interest as the Mandatory with the view to not increasing her obligations. No countenance can be given to the suggestion that, as the result of the attitude adopted by South Africa, the régime as established by that Opinion of the Court is liable to changes—except in pursuance of the principle that that régime as a whole must be and remain effective. The Opinion of 11 July 1950 has been accepted and approved by the General Assembly. Whatever may be its binding force as part of international law—a question upon which the Court need not express a view—it is the law recognized by the United Nations. It continues to be so although the Government of South Africa has declined to accept it as binding upon it and although it has acted in disregard of the international obligations as declared by the Court in that Opinion.

" At the same time, and for the same reasons, in so far as the Opinion of 1950 is relied upon for the purpose of upholding literally all the safeguards and restrictions formulated in the interest of the Mandatory, it must, like any other legal instrument, be interpreted reasonably and in accordance with legal principle. The jurisprudence of the Court in the matter of treaties and otherwise provides by analogy some useful instruction in this respect. In the fifteenth Advisory Opinion on the *Jurisdiction of the Courts of Danzig*, the Court formulated the principle that a State cannot avail itself of an objection which would amount to relying on the non-fulfilment of an obligation imposed on it by an international engagement (Series B, No. 15, p. 27). It is not suggested that these principles are directly germane or applicable to the present case. For this is not the case of a treaty—although the Opinion of 11 July 1950 did no more than to formulate a régime resulting from two multilateral conventional instruments, namely, the Covenent of the League of Nations and the Charter of the United Nations. Neither do I suggest that this is technically a case of estoppel—though there is a measure of contradiction, reminiscent of situations underlying estoppel, in the fact that an instrument repudiated by a Government is being invoked for the benefit of that Government. (While the Government of South Africa did not participate in the present proceedings before the Court, in the Fourth Committee of the General Assembly of 1955 it opposed oral hearings in reliance on the Advisory Opinion of 11 July 1950 (Official Records, Fourth Committee, 500th Meeting, 8 November 1955, p. 182).) Finally, I do not attach any decisive importance to the possible submission that this is an instance of a Government claiming to benefit from its own wrong by declining to supply and transmit information which, according to the Opinion of 11 July 1950, it is legally bound to supply and transmit and at the same time resisting the contemplated effort to obtain alternative information. For it may not be easy to characterize precisely in legal terms a situation in which South Africa declines to act on an Advisory Opinion which it was not legally bound to accept but which gave expression to the legal position as ascertained by the Court and as accepted by the General Assembly.

" Nevertheless, the above considerations are not wholly extraneous to the case now before the Court. For these are not technical rules of the law of contract or treaties. They are rules of common sense and good faith. As such they are relevant to all legal instruments, of whatsoever description, inasmuch as their effect is not to permit a party which repudiates an instrument to rely literally on it—or have it revoked for its benefit—in a manner which renders the fulfilment of its purpose impossible. In particular, these principles are relevant to the question—which ought not to remain unanswered—as to the legal basis of a judicial decision which by way of interpretation substitutes a measure of supervision or an act of performance for one repudiated or frustrated by the party affected by the instrument in question. What, apart from the general principles of interpretation as set out above, is the authority for the proposition that the Court may replace one means of supervision by another, not previously authorized—nay, expressly disallowed? This, it may be objected, is not the way in which courts normally proceed in the matter of contracts between individuals (though in many countries courts, when confronted with a situation in which a substantive provision of the instrument governing succession is in danger of being frustrated owing to an obscurity of expression or an event subsequently arising, will vary the original disposition in such a way as to make it approximate so far as possible to the general intention of its author. It will be noted that the supervision by the United Nations of the mandate for South West Africa constitutes the most important example of succession in international organization).

" However, this is not a case of a contract or even of an ordinary treaty analogous to a contract. As already pointed out, this is a case of the operation and application of multilateral instruments, as interpreted by the Court in its Opinion of 11 July 1950, creating an international status—an international régime—transcending a mere contractual relation (*I.C.J. Reports 1950*, p. 132). The essence of such instruments is that their validity continues notwithstanding changes in the attitudes, or the status, or the very survival of individual parties or persons affected. Their continuing validity implies their continued operation and the resulting legitimacy of the means devised for that purpose by way of judicial interpretation and application of the original instrument. The unity and the operation of the régime created by them cannot be allowed to fail because of a breakdown or gap which may arise in consequence of an act of a party or otherwise. Thus viewed, the issue before the Court is potentially of wider import than the problem which has provided the occasion for the present Advisory Opinion. It is just because the régime established by them constitutes a unity that, in relation to instruments of this nature, the law—the existing law as judicially interpreted—finds means for removing a clog or filling a lacuna or adopting an alternative device in order to prevent a standstill of the entire system on account of a failure in any particular link or part. This is unlike the case of a breach of the provisions of an ordinary treaty—which breach creates, as a rule, a right for the injured party to denounce it and to claim damages. It is instructive in this connection that with regard to general texts of a law-making character or those providing for an international régime or administration the principle of separability of their provisions with a view to ensuring the continuous operation of the treaty as a whole has been increasingly recognized by international practice. The treaty as a whole does not terminate as the result of a breach of an individual clause. Neither is it necessarily rendered impotent and inoperative as the result of the action or inaction of one of the parties. It continues in being subject to adaptation to circumstances which have arisen.

" IV. It is now necessary to enquire to what extent the situation with which the General Assembly—and the Court—are confronted call for and permit the application of the principles of law as here outlined. To what extent has the refusal of the Union of South Africa to submit annual reports and to transmit and comment on written petitions in conformity with the obligations established in the Opinion of 11 July 1950, created a gap so serious in the system there contemplated as—in conformity with these principles—to render legitimate alternative sources of information not exceeding the total degree of supervision envisaged in that Opinion? These principles are that the Opinion of 1950 must be read as a whole; that it cannot be deprived of its effect by the action of the State which has repudiated it; and that the ensuring of the continued operation of the international régime in question is a legitimate object of the interpretative task of the Court.

" Having regard to the non co-operation of the Mandatory, what is the position in the matter of the sources of information available to the supervising agency and indispensable for the proper working of the system of supervision and the implementing of the Opinion of the Court of 11 July 1950?

" In the first instance, the annual report of the Mandatory, as provided by the Opinion of the Court of 1950 and as forming an integral part of the procedure of the League of Nations, has disappeared. It has been replaced by a conscientious and well-documented volume prepared by the Secretary-General and entitled ' Information and Documentation in respect of the Territory of South West Africa ' (such as in Doc. A/AC 73 L 3; Doc. A/AC 73/L 7). That volume provides, to a considerable extent, the substance of the report which the Committee on South West Africa submits to the General Assembly. But this is not a document in the same category as a report submitted by the Mandatory and explained by it point by point, if necessary, at the meetings of the Committee. The supervising authority is thus deprived of an authentic source of information which is one of the two main pillars of the system of supervision. There is a gap here and a resulting diminution of the degree of supervision as previously existing and as envisaged by the Court in its Opinion of 1950. It is consistent with that Opinion to interpret it in a manner which authorizes the filling of that gap—provided that the result is not to increase the total degree of supervision of the system as a whole.

" The second main source of information which forms an important part of the system of supervision and to which the Opinion of the Court of 1950 refers in passages of particular emphasis are petitions sent by the inhabitants of the administered territory. Under the League of Nations only petitions in writing were admissible. These, when supplemented by the observations of the Mandatory and the explanations supplied by him in the course of the proceedings of the supervising organ, are a weighty instrument of supervision and an important factor in the formation of the judgment of the supervising authority. As the result of the attitude of non co-operation adopted by the Union of South Africa, the efficacy of that source has been substantially reduced. The Mandatory, who is absent from the meetings of the Committee, provides no comment of his own and does not assist the supervisory body by explanations supplied at its request during or subsequent to its meetings. Moreover, the Mandatory has declined to transmit petitions submitted by the inhabitants of the administered territory. If the procedure of the Mandates Commission were adhered to in this respect, it is difficult to see how written petitions from the inhabitants of the territory could come at all before the Committee on South West Africa. That Committee has now adopted a deliberate change in the procedure obtaining under the Mandates System. The rules of procedure as adopted in 1923 by the League of Nations provided that petitions by communities or sections of the population of mandated territories shall be sent to the Secretariat of the League through the mandatory governments concerned and that any petitions received by the Secretary-General of the League through any channel other than the mandatory government should be returned to the signatories with the request that they should re-submit the petitions in accordance with the above procedure. As the Government of South Africa has refused to transmit the petitions thus received, the Committee on South West Africa has provided in its Provisional Rules of Procedure—Rule 26—that on receipt of a petition the Secretary-General shall request the signatories to submit the petition to the Committee through the Government of South Africa but that if, after a period of two months, the petition has not been received through the

Government of South Africa, the Committee shall regard the petition as validly received. It is also provided that the Committee shall subsequently notify the Government of South Africa as to the conclusions it has reached on the petition. It does not appear that objection has been raised against that particular—and important—departure from the procedure obtaining under the Mandates System.

" However, although thus made available to the supervising organ, the written petition no longer fulfils the same function and no longer partakes of the same effectiveness as written petitions examined in the presence and with the co-operation of the Mandatory. It is in the nature of *ex parte* information which may or may not be capable of verification. This does not mean that the written petition examined without the assistance of the Mandatory is without value or that it can never provide a basis for the conclusions of the supervising Committee. But it is clear that it is not the same thing as and that it is a lesser thing than written petitions within the framework of a machinery operating with the participation of the Mandatory.

" The interpretation, in this matter, of the Opinion of the Court of 11 July 1950 is thus confronted with the fact that owing to the attitude of South Africa the potency of the two principal instruments of supervision is substantially reduced and that other means, not fundamentally inconsistent with that Opinion, must be found in order to give effect to its essential purpose. The crucial question which the Court has now to answer is: Are oral hearings one of these means? Are they truly necessary and effective for filling the gap that has arisen? Do they secure the reality of the task of supervision otherwise reduced below the level contemplated by and underlying the Opinion of 1950? I am of the view that, in the circumstances, they fulfil that purpose. Oral hearings contribute one of the tangible elements of supervision which otherwise—i.e., in the absence of other means of supervision—operates in an atmosphere of unreality. Undoubtedly, the information received through oral hearings may be exaggerated, false and misleading. Oral hearings may be abused by fanatics and seekers for self-advertisement. But these difficulties and dangers are also present, and less capable of correction, in the case of written petitions—especially when examined in the absence of the Mandatory. Moreover, it is clear that the importance of oral hearings increases in proportion as the effectiveness of the other instruments of supervision has been reduced as the result of the attitude of the Union of South Africa. If the United Nations were not confronted with the refusal of the Union of South Africa to abide by its obligations as a Mandatory in conformity with the Opinion of the Court of 1950 and if there remained, in their full effectiveness, the other instruments of supervision therein provided, then the advantages of oral hearings, considerable as they may be and though being, according to some, in keeping with the recognition within the United Nations of the right of oral hearing as a corollary of the fundamental right of petition, would be no more than an improvement on the existing machinery of supervision. They would not be essential to it. In fact, being in the nature of an excess of supervision as it existed under the League of Nations, they would be contrary, on that account, to the Opinion of 1950. But this is not the position with which the Court is confronted. The Court is not here called upon to express a view on the controversial question of the merits of oral hearings in general. The question before it is the necessity for oral hearings in a situation amounting to a substantial drying up of other sources of information.

" There is therefore little force in the argument that, after all, oral hearings are not the only source of information. Admittedly, they are not. There are other sources. In particular, written petitions are still available. However, if the effectiveness of these available means has become drastically reduced owing to the attitude of the Mandatory, then it is open to the

Committee on South West Africa, as a matter of effectiveness of the instrument which it has to apply, to fulfil that duty by other means.

" It may be objected that oral hearings in the absence of the Mandatory are a procedure which amounts to passing of judgment in default upon that authority in its absence and that for that, if no other, reason it constitutes a particularly flagrant excess of supervision. But is that so? When the Committee on South West Africa examines written petitions in the absence of the Mandatory, that procedure may also be said to amount to passing of judgment by default. The Committee simply informs the Government of South Africa of its conclusions. But it has not been denied that the Committee is entitled to do so and that the rule of procedure which it has adopted for that purpose is in accordance with the Opinion of the Court of 11 July 1950. Moreover, when the supervising authority hears petitioners in person it has the opportunity of checking and verifying their statements by a direct and efficacious method which is not available when written petitions are examined in the absence of their authors.

" This, then, is the principal question before the Court. Is the need for oral hearings real? If permitted, would they, in the situation before the Court, contribute to exceeding the total degree of supervision as circumscribed in the Opinion of the Court of 1950? For it is only under the following two conditions that oral hearings of petitioners can be held to be consistent with that Opinion: the need for them must be real in terms of implementing the two basic provisions of that Opinion of the Court; secondly, they must not add to the degree of supervision in such a way that in the aggregate it becomes more stringent than under the League of Nations. Oral hearings of petitioners would not be permissible if they were attempted not because of that real need but as an expression of the disapproval of the attitude of South Africa. Any such innovation implying that the Opinion of 1950 has lost its regulating and restraining force would not be permissible. The Opinion of 1950 is not a treaty whose provisions can be discarded for the reason that South Africa has declined to comply with them. It gives expression to an objective legal status recognized by the United Nations and it must be acted upon. But it must be acted upon in a reasonable—and not in a one-sided and literal—manner.

" My conclusion is, therefore, that there is a true need for oral hearings in order to supplement sources of information which have become incomplete in consequence of the attitude of the Union of South Africa and that, if adopted, they would not result in exceeding the total degree of supervision as laid down in the Opinion of 11 July 1950. This being so, they must be held to be consistent with that Opinion. They would be so consistent even if the Opinion of 11 July 1950 were in absolute terms, namely, if it did not contain the qualification ' as far as possible '.

" V. In view of the preceding observations I need only refer briefly to the second qualifying clause of the Opinion of 11 July 1950, namely, that ' the degree of supervision . . . should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations '. The expression ' as far as possible ' is a form of words of pronounced elasticity. Its interpretation is a matter of degree. It is ' possible ' for a system of supervision to continue without reports of the Mandatory, without written petitions accompanied by his comments and explanations, without the representatives of the latter being present at the meetings of the supervisory organ, and without oral hearings filling the gap which has thus arisen. But that would not be a supervision as contemplated by the Opinion of 1950. It would be a supervision falling short not only of the assumption of effectiveness which underlay that Opinion of the Court, but also of what must be regarded as a reasonable measure of effectiveness. It has been suggested that the Committee would meet with no difficulty if it were to abstain from oral hearings of petitioners. Admittedly, there is as a rule no difficulty encountered by doing nothing or little, but this is hardly a reasonable standard by which to gauge the fulfilment of the task of the supervising authority. There is no occasion to go to the extreme length in thus interpreting away the requirements of satisfactory supervision in deference to a persistent attitude of non co-operation on the part of the Mandatory. There is no general interest involved in weakening the system of supervision so considerably below the level contemplated in the Opinion of 1950. For these reasons I find no difficulty in accepting the view that the saving expression ' so far as possible ' can properly be relied upon in this case so as to permit oral hearings of petitioners. I cannot accept the argument that the expression ' as far as possible ' should be reduced to insignificance for the reason that the Opinion of 1950 intended to crystallize the substantive and procedural *status quo* as it then existed. Reasons have been given above why there is no merit in the view that the Court ought to lend its authority to the continued and unaltered maintenance of that *status quo* by upholding the two qualifying clauses of its Opinion of 1950 after the two basic provisions which it thus qualified have ceased to be operative as the result of the attitude of the Mandatory.

" There is one point which requires some explanation in this connection. In its Opinion of 7 June 1955 on the *Voting Procedure*, the Court, in explaining the expression ' as far as possible ' as being ' designed to allow for adjustments and modifications necessitated by legal or practical considerations ' (at p. 77) —an explanation which fully covers the issue now before the Court—seemed to give a restricted scope to that expression. It explained that phrase as ' indicating that in the nature of things the General Assembly, operating under an instrument different from that which governed the Council of the League of Nations, would not be able to follow precisely the same procedures as were followed by the Council ' (*ibid.*). It might thus appear that the Court was limiting the operation of the ' as far as possible ' principle to the exigencies of the Charter and of the procedure of the General Assembly. It is not believed that this is so. In the case of the *Voting Procedure* the Court was concerned with this particular aspect of the question and it was therefore natural that its reasoning should have concentrated on that issue. There is no reason to assume that it intended to limit generally the apparent comprehensiveness of the clause ' as far as possible '. Similar considerations apply to those passages of the Opinion of 1955 in which the Court attached importance to stating that the expression ' degree of supervision ', inasmuch as it related to the ' measure and means of supervision ' and to ' the means employed by the supervisory authority in obtaining adequate information ', should not be interpreted as relating to procedural matters (at p. 72). The correct view is that the issue of oral hearings is both a question of substantive supervision and of procedure. It is clear that a procedural measure may decisively affect the rights and obligations of the parties. There would be a disadvantage in basing the Judgments and Opinions of the Court not on legal considerations of general application but on controversial technicalities and artificial classifications.

" VI. There remains the question whether, assuming that there has been created a real gap in the system of supervision and that oral hearings may be instrumental to some extent in filling that gap, the consistency of oral hearings with the Opinion of 11 July 1950 can be ascertained by way of judicial interpretation or whether it can only be decreed, by way of legislative change, by the General Assembly. This question, it is believed, must be answered affirmatively in the light of the general legal considerations outlined above.

" There are three possible methods of approach for a court of law confronted with a situation such as the present, namely, that of a party refusing to recognize or to act upon a legal instrument which purports to express the legal obligations of that party and whose validity must, as in the present case, be regarded as continuing:

" (1) It is possible to hold that, even if that party refuses to be bound by any of the obligations or limitations of the legal instrument in question, the other party—in this case the United Nations and the Committee on South West Africa are the other party—must fulfil literally and abide by all the restraining provisions enacted for the benefit of the recalcitrant party even if such one-sided application results in reducing substantially the effectiveness of the instrument. Any such method I consider to be unsound.

" (2) The second method is to assert that, as the legal instrument in question has been repudiated by one party, a new factual and legal situation has arisen in which the other party is free to act as it pleases and to disregard all the restraints of the instrument. This, I believe, is not the view which the Court can properly adopt. The Opinion of 1950 continues to be the law. It established—or recognized—a legal status of the Territory. It is the law binding upon the Committee for South West Africa.

" (3) The third possibility, which appears to me most appropriate as a legal proposition and in accordance with good faith and common sense, is to interpret the instrument as continuing in validity and as fully applicable subject to reasonable re-adjustments calculated to maintain the effectiveness, though not more than that, of the major purpose of the instrument.

" Similarly, it is in the light of the general principle as thus stated that there must be considered the contention that if as the result of the attitude of South Africa and the situation which has thus arisen it is necessary to effect changes in the Opinion of the Court of 11 July 1950, such changes must be accomplished by the General Assembly and not by the Court. For it would appear that that argument begs the question. The Court, in finding that oral hearings are consistent with its Opinion of 11 July 1950, is not changing the law as laid down in that Opinion. It interprets it in accordance with good sense and sound legal principle. This in fact was the method which the Court followed in its Opinion of 11 July 1950, when it was called upon to interpret the relevant clauses of the Covenant of the League of Nations and of the Charter of the United Nations. In answering the question as to the existing international legal position of South West Africa it applied the relevant international instruments in so far as this was possible. It did not change the law as contained therein. The essence of that Opinion was that the Court declined to apply literally the legal régime which it was called upon to interpret. It declined to admit that the continuity of the mandatory system meant necessarily that only the League of Nations—and no one else—could act as the supervising authority. On the face of it, the Opinion, inasmuch as it held that the United Nations must be substituted for the League of Nations as the supervisory organ, signified a change as compared with the letter of the Covenant. Actually, the Opinion did no more than give effect to the main purpose of the legal instruments before it. That is the true function of interpretation. The Opinion gave effect to the existing law in a situation in which otherwise its purpose, as the Court saw it, would have been endangered. This is essentially the situation with which the Court is confronted in the present case.

" There is one further consideration which must be borne in mind in relation to the suggestion that although the Court cannot declare oral hearings of petitioners to be consistent with its Opinion of 1950, the General Assembly—and the General Assembly only—has the power to do so. The Preamble to the request for the present Opinion begins as follows: ' The General Assembly, having been requested by the Committee on South West Africa to decide whether or not the oral hearing of petitioners on matters relating to the territory of South West Africa is admissible before that Committee . . .' The Court is requested to advise the General Assembly whether, as a matter of law embodied in the Opinion of the Court of 11 July 1950, the General Assembly is entitled to decide that oral hearings are admissible. In view of this, it is hardly possible for the Court to give a negative answer to the question put to it and to say—or imply—that if any change is required as the result of the attitude of South Africa then that change must be effected by the General Assembly and not the Court. For this is the very question which the Court has been asked to answer. It is not possible for the Court to say that it would be contrary to the Opinion of 11 July 1950 for the General Assembly to authorize oral hearings and at the same time to say, or imply, that the General Assembly may do it. If the General Assembly had felt at liberty to authorize oral hearings regardless of whether such authorization is consistent with the Opinion of 11 July 1950 or not, it would have hardly found it necessary to request the Court to give the present Advisory Opinion. This being so, the Court could not, in the present case, renounce its legitimate function on the ground that the appropriate result can be achieved by the legislative action of the political organ. Reluctance to encroach upon the province of the legislature is a proper manifestation of judicial caution. If exaggerated, it may amount to unwillingness to fulfil a task which is within the orbit of the functions of the Court as defined by its Statute. The Court cannot properly be concerned with any political effects of its decisions. But it is important, as a matter of international public policy, to bear in mind the indirect consequences of any pronouncement which, by giving a purely literal interpretation of the Opinion of 11 July 1950, would have rendered it impotent in face of obstruction by one party.

" In fact, from whatever angle the request for the present Advisory Opinion is viewed, a substantive answer to it seems indicated by reference to general legal considerations such as outlined in this and in the preceding parts of this Separate Opinion. This applies also to that part of the Opinion in which I have come to the conclusion that oral hearings of petitioners would —apart from the situation actually confronting the United Nations—be inconsistent with the Opinion of 11 July 1950 inasmuch as they depart from the system which obtained under the League of Nations. But, as explained, that system was predicated on the fulfilment by the Mandatory of his obligations in the matter of reports and petitions. As the result of the attitude now adopted by the Union of South Africa, that assumption no longer applies. The maxim *cessante ratione cessat lex ipsa* is a trite legal proposition. This circumstance does not affect the propriety and the necessity of its judicial application.

" It is necessary in this connection to refer to the apparent inconsistency between the view which is put forward in this Separate Opinion (and which in effect underlies the present Opinion of the Court) and that on which the Court seems to have based its Opinion of 18 July 1950 on the *Interpretation of the Peace Treaties* (*Second Phase*). In the latter case the Court declined to hold that the failure, contrary to their international obligations, of certain States to appoint representatives to the Commissions provided by the treaties in question for settling disputes justified some alternative method of appointment not contemplated by these treaties. As in the present case, the conduct of the States in question had thus created a gap—in fact, a breakdown—in the operation of the system of supervision contemplated by the treaties. Yet the Court refused to admit the legality of an alternative method designed to remedy the situation. It said:

> ' The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.' (*I.C.J. Reports 1950*, p. 229.)

" The resemblance of the two cases is as striking as the apparent discrepancy between the present Opinion of the Court and that in the case of the *Interpretation of the Peace Treaties.* In view of this it is appropriate and desirable to state the reasons, if any, for this seeming departure from a previous Opinion. Without expressing a view as to the merits of the Opinion of the Court on the *Interpretation of the Peace Treaties*, I consider that, in fact, the two cases are dissimilar in a vital respect. The clauses of the Peace Treaties of 1947 relating to settlement of disputes were, as shown in their wording and the protracted history of their adoption, formulated in terms which clearly revealed the absence of agreement to endow them with a full measure of effectiveness—including safeguards to be resorted to in the event of the failure of one of the parties to participate in the procedure of settlement of disputes. This was a case in which the application of the principle of effectiveness in the interpretation of treaties found, in the view of the Court, a necessary limit in the circumstance that the parties had failed—not accidentally, but by design—to render them fully effective. This is not the position in the present case where the Court is confronted with the interpretation of provisions concerning a régime in the nature of an international status of established and continuous operation; provisions in relation to which the Court, in the Opinion of 11 July 1950 and that of 7 June 1955 on *Voting Procedure*, affirmed in emphatic language the necessity of securing the unimpeded and effective application of the system of supervision in accordance with the fundamental provisions of the Covenant and the Charter; and with regard to which it qualified the notion of any literal and rigid continuity of the Mandates System by making it obligatory only ' so far as possible '—an expression expressly ' designed to allow for adjustments and modifications necessitated by legal or practical considerations ' (*I.C.J. Reports 1955*, p. 77).

" This being so, the present Advisory Opinion of the Court seems to be fully in accordance with its previous practice of interpreting treaties and other international instruments in a manner calculated to secure their effective operation. For this reason, subject to some doubts as to the formulation of the operative part of the Opinion and as to some aspects of its reasoning such as the extent of the reliance on the implied powers of the Council of the League of Nations, I have no hesitation in concurring in the Opinion of the Court."

Judges Badawi, Basdevant, Hsu Mo, Armand-Ugon and Moreno Quintana delivered a Dissenting Opinion in the following terms:

" We regret that we are unable to concur in the Opinion of the Court and we believe it necessary to state the main grounds upon which we dissent.

" The Court has usefully defined the meaning which it attaches to the question which has been put to it by the General Assembly.

" In the first place, it has stated that it understood this question as having reference to the hearing, by the Committee on South West Africa, of persons having submitted written petitions. This clarification is useful, for in the debates in the Committee on South West Africa and in the Fourth Committee there were those who discussed what have been called ' oral petitions '.

"We shall place ourselves on the same ground as the Court, namely, that of the hearing of a person who has previously submitted a written petition in due form. We shall merely make one observation in this connection. If it be considered that the grant of a hearing to one who has submitted a written petition is not consistent with the Opinion of 1950, the same will be true *a fortiori* of permission to submit an oral petition. If, on the other hand, the hearing of one who has submitted a written petition is found to be consistent with the Opinion of 1950, that view will leave open the question whether it is consistent with that Opinion to permit the submission of an oral petition.

" It is further stated in the reasoning of the present Opinion, though not repeated in the operative part, that, while the question submitted to the

Court in terms refers to the grant of oral hearings by the Committee on South West Africa, the Court interprets this question as meaning: whether it is legally open to the General Assembly to authorize the Committee to grant oral hearings to petitioners. We accept this interpretation, which seems to us to follow from the fact that the Committee having requested the General Assembly to decide whether or not the oral hearing of petitioners is admissible before that Committee, the General Assembly considered it desirable to seek the opinion of the Court.

" The request for an Opinion submitted to the Court on December 19th, 1955, in stating the question put to it, refers solely to the compatibility with the Opinion of 1950 of a decision to grant hearings to petitioners. 'Is it consistent with the advisory opinion . . . [of 1950] for the Committee on South West Africa . . . to grant oral hearings to petitioners . . .? ' It is thus compatibility with the Opinion of 1950 which is to be appraised, and nothing else. The Request for an Opinion, in this respect, contains an exact statement of the question upon which an Opinion is sought, as required by Article 65, paragraph 2, of the Statute. One can understand why the General Assembly should have put the question on this ground, since it had previously adopted the Opinion of the Court as the basis for its action. In putting the question in this way, it has submitted a legal question to the Court.

" It is therefore in the Opinion of 1950 that the Court must seek the elements for its reply.

" The General Assembly has not asked it to seek them in factual or legal considerations outside the scope of that Opinion, in particular in the attitude of the Union of South Africa, nor to take note of the latter's refusal to submit to the exercise of supervision by the United Nations. The Request for an Opinion makes no allusion either to that attitude or to that refusal. These facts were subsequent in date to the Opinion of 1950, which was confined to describing the legal position in the light of then existing factors: they cannot therefore constitute factors to be considered in ascertaining the meaning and scope of that Opinion.

" The Resolution setting forth the Request for an Opinion twice refers to Resolution 749 A (VIII). The first reference, in the preamble, is designed to serve as an indication of a function assigned to the Committee on South West Africa; the second, in the operative clause, has as its purpose the identification of that Committee. There is nothing there which expressly or impliedly indicates the General Assembly's intention to request the Court, which is called upon to determine the meaning and scope of its Opinion of 1950, to have regard to all that is stated in Resolution 749 A (VIII), and particularly to what is said concerning the attitude of the Union of South Africa, its refusal to co-operate in the exercise of supervision and the sentiments of the General Assembly in this regard. The facts thus set out and the regret expressed with regard to them in Resolution 749 A (VIII) are not repeated in the Request for an Opinion: it is not there stated that the Court should itself take note of these facts, still less that it should evaluate them for the purpose of arriving at a conclusion as to the compatibility of the grant of hearings to petitioners with its Opinion of 1950.

" It is not, moreover, clear how a resolution adopted by the General Assembly in 1953 could, by referring to facts subsequent to the Opinion of 1950, enlighten the Court as to the meaning and scope of that Opinion which is precisely what is now the issue.

" It may furthermore be observed that it is only if it should be found that a proper interpretation of the Opinion of 1950 leads to the conclusion that the hearing of petitioners is not consistent with that Opinion, that the question may arise whether the refusal of the Union of South Africa to submit to the exercise of supervision constitutes a new element such as nevertheless to justify such a hearing. That would be neither to have regard to the meaning of the Opinion of 1950 nor to ascertain whether the hearing of petitioners is or is not consistent with that Opinion, which is a purely legal question and, as such, one suitable for submission to the Court. It would be to enquire whether that refusal constitutes a ground justifying the supervising authority in departing in this respect from observance of the Opinion of 1950. Such a question might be asked, but the considerations upon which a reply to it might be based would go beyond the scope of legal considerations and would involve political elements the appraisal of which is not within the domain of the Court, and such a question has not been put to it.

" To confine attention to the question which has been put and to the terms in which it has been stated, where that statement is an exact one, is the normal course to adopt and one which accords with the respective rôles of the General Assembly, which has put the question, and of the Court, which is called upon to give its reply. That was the course adopted by the Court in the case relating to *Conditions of Admission of a State to Membership in the United Nations* (I.C.J. Reports 1947–1948, p. 61). We would gladly repeat to-day what the Court then said, namely, that it ' is not concerned with the motives which may have inspired [the] request '.

" Since the reply to the question now put to the Court is to be sought in the Opinion of 1950, it is necessary to seek, in the statement made in that Opinion—in anything which may shed light upon the ideas inspiring it and in the references which it contains—the elements which will determine that reply.

" In answer to the first question then put to the Court, the Opinion of 1950 stated ' that South West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920 '. The operative clause of the Opinion there found that the previously existing situation was maintained.

" Having been questioned, in the second place, as to the continued existence and as to the nature of the international obligations upon the Union of South Africa under the Mandate for South West Africa, the Court, in order to reply to this question, made use, both in quotations on which it relied and in the considerations which it directly stated, of expressions such as: ' continue to administer the mandated territories in accordance with their respective Mandates ', ' will continue to administer the Territory scrupulously in accordance with the obligations of the Mandate ', ' to maintain the *status quo* and continue to administer the Territory in the spirit of the existing Mandate ', ' recognition by the Union Government of the continuance of its obligations under the Mandate '. Passing then to the mandatory Power's obligation to submit to supervision, the Opinion, in its reasoning, again adopted this idea of continuity and of maintenance of the *status quo* when it said: ' It cannot be admitted that the obligation to submit to supervision has disappeared ', as the result of the disappearance of the Council of the League of Nations, which together with other considerations upon which there is no need to dwell here, led the Court to ' the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations . . . and that the Union of South Africa is under an obligation to submit ' to such supervision: again the Court speaks of ' supervisory functions exercised by the League ' and ' taken over by the United Nations '.

" This notion of continuity, of maintenance of the *status quo*, is found again in the Opinion when it sees the right of petition admitted by the Council of the League of Nations as a ' right which the inhabitants of South West Africa had . . . acquired ' and one which the Opinion regarded as ' maintained ' by Article 80 of the Charter.

" The same idea appears again, still more clearly, when the Opinion, in view of the fact of the substitution of the United Nations for the League of Nations in respect of the exercise of supervision, draws this consequence: ' The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations '. This wording corresponds exactly to the proposition recalled above, to the effect that ' the supervisory functions exercised by the League would be taken over by the United Nations '.

" In harmony with these considerations set out in its reasoning, the Opinion states, in its operative clause, that ' the Union of South Africa continues to have ' its obligations as a mandatory Power, both in respect of substantive obligations and in respect of the exercise of supervision.

" There are thus many statements in the Opinion which express the idea of the maintenance of the former régime in respect of the position of the Territory of South West Africa, the international obligations upon the Union of South Africa as a mandatory Power and the exercise of supervision.

" Is this observation confirmed by the spirit of the Opinion of 1950?

" The spirit of the Opinion, which may serve as a guide to its interpretation and therefore to the reply to be given to the question relating to compatibility with that Opinion which has now been submitted to the Court, may be found from a consideration of its purpose and of the circumstances in which it was requested and given.

" The purpose of the Opinion of 1950 was to reply to the questions then put to the Court by the General Assembly. These questions related to the status of the Territory of South West Africa and to the obligations of the Union of South Africa. It was necessary to determine with regard to each point whether the former position was maintained. The Court's reply was in the affirmative.

" The General Assembly had not requested the Court to determine and to say whether the General Assembly had a part to play in this connection, nor to what extent and in what way such a rôle was to be performed. The Court was faced with this question only incidentally, because recognition of the continuance of the Mandate and of the corresponding obligations on the Union of South Africa might encounter objections based on the disappearance of the supervisory organ, the Council of the League of Nations. The Court then pointed out the importance of ' the administration of mandated territories ' being ' subject to international supervision ', but it did not then seek to determine what the powers of the supervising authority should be. It simply sought to ascertain whether, after the disappearance of the League of Nations, there still existed an international authority qualified to exercise this function of supervision. It found it in the General Assembly of the United Nations, and having reached this solution on the basis of the provisions of the Charter, it went no further: it was unnecessary for it to define the powers with which the Council of the League of Nations had been invested or to have recourse to the notion of a transfer to the General Assembly of the powers of the Council of the League of Nations. The provisions of the Charter were sufficient for the Court to give expression to the main idea to which it held, namely, the need for the maintenance of the supervisory function, that is to say, the idea of continuity.

" The position, at the time when the Opinion of 1950 was requested and given, was that resulting from the disappearance of the League of Nations and the termination of the Covenant under which the Mandate for South West Africa had been entrusted to the Union of South Africa. This situation raised the question whether the Mandate continued to exist and what were the obligations of the Union of South Africa in this connection. It was to this question that the Court was called upon to reply, and the main feature of its reply was that there had been no change but that there was continuity.

" An important element of the situation then existing was referred to on a number of occasions by the Court in the reasoning of its Opinion: that is, the willingness expressed by the Union of South Africa to regard itself as continuing to exercise its Mandate, to continue to administer the Territory in accordance with the provisions of the Mandate and to continue to render reports to the United Nations.

" The spirit of the Opinion thus fully confirms what is expressed by its letter: the continuity of the Mandate and of the international obligations of the Union of South Africa which result therefrom.

"What is the meaning of this continuity, of this maintenance of the *status quo?* Does it, so far as the point at present under consideration is concerned, refer to the supervision which was in fact applied during the existence of the League of Nations or does it refer to the powers possessed by the Council of the League of Nations in the matter of supervision, whether any such powers had been actually exercised by the Council or not?

" In dealing with the question to which it gave its reply in 1950, the Court was not required to express an opinion as to the powers of the Council of the League of Nations. The Opinion of 1950 nowhere alludes to these powers or seeks to determine what they were or what were their limits; nor is it concerned with the question whether or not they were exercised by the Council.

" A consideration of the powers with which the Council was invested would have been necessary if the Court had accepted the idea of the United Nations' succession to the League of Nations, of the transfer of powers from one organization to the other. The Court did not overlook this particular aspect of the problem.

" Resolution 24 (I) adopted by the General Assembly on February 12th, 1946, had made provision with regard to the method to be adopted for the examination of any request ' that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character '. Here appeared the idea of a possible transfer of powers entrusted to the League of Nations. But the course indicated by that Resolution was not followed. The Union of South Africa has not submitted to the General Assembly any request that the latter should assume the ' powers entrusted ' to the Council of the League of Nations. The Opinion of 1950 did not therefore place itself on the same ground as Resolution 24 (I). On the contrary, it stated in its reasoning that ' the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United Nations nor expressly assumed by that organization '. The Opinion does not base itself on the idea of succession, on the idea of the transfer of powers.

" The Court, unattracted by the idea of succession, of the transfer of powers, based itself on the objective elements of the situation—the importance of international supervision under the Mandates System as well as the provisions of the Charter of the United Nations. It was in these elements that the Court, in its Opinion of 1950, found ' decisive reasons ' for the view that ' the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations '.

" At no time did the Court base itself on the extent of the powers which the Council of the League of Nations exercised or could have exercised. An opportunity was in fact offered to it to embark upon such a consideration when it referred to the innovation brought about in 1923 by the institution of the right of petition. But the Court did not raise the question whether that had constituted the exercise of a power belonging to the Council of the League of Nations or whether it was the result of an express or tacit agreement. Here, as elsewhere, the Opinion did not seek to determine with what powers the Council was invested. It limited itself to stating the existing situation for the purpose of asserting the maintenance of the right of petition, just as it had referred to that situation in saying that the General Assembly was qualified to exercise the supervisory functions 'previously exercised by the League of Nations'—the functions previously 'exercised' and not those which it was entitled to exercise or could have exercised.

"This reference to the existing situation, to the exercise of the function of supervision as it had been exercised during the time of the League of Nations, is again encountered when the Opinion—defining the proper exercise of that same function by the General Assembly of the United Nations—states, not as a new or isolated proposition but as a consequence of what had previously been said with regard to the continuance of the obligations of the Union of South Africa and the competence of the General Assembly, that 'the degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System'. The words are 'which applied'—not 'which might have been applied' or 'which was applicable'. These words refer to the practice which was established, whether that practice remained within or went beyond the powers conferred upon the Council. The established practice is the only criterion.

"This is, moreover, implicitly confirmed by the remainder of the sentence, if not by its letter, at least in its spirit. This second part of the sentence introduces an element of flexibility in the domain of procedure, when it states that the degree of supervision 'should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations'. The General Assembly is thus invited to conform to the procedure previously followed, but it is given certain discretionary freedom, as indicated by the words 'as far as possible'. This restriction is of value after the principle has been laid down that the degree of supervision should not exceed what it was in the former practice. But if the idea be accepted as a basis that the General Assembly has the same powers as the Council of the League of Nations, and if it be admitted that the latter had the power to modify its procedure in respect of supervision, the General Assembly would *ipso facto* have the same power of modifying its procedure: the second part of the sentence in question would then be pointless, since it purports to confer on the General Assembly a discretionary power which, on that interpretation, the Assembly would already possess. Indeed, by the idea of conformity stated in that sentence, it would limit the freedom of the General Assembly, a freedom which on that interpretation should remain unimpaired.

"This confirms that the Opinion, when speaking of supervision, intended to maintain the former practice and not to refer to powers which might subsequently be held to have belonged to the Council, although the latter never exercised them. It was a little late in 1950, and it is still later at the present time, to seek to list such powers for the purpose of ascertaining those of the General Assembly.

"The maintenance of the former régime, that is the dominant idea in the determination by the Opinion of 1950 of the status of the Territory of South West Africa and of the obligations of the Union of South Africa, particularly of that obligation which relates to the point at present under consideration: the obligation to submit to the exercise of supervision.

"It follows from the maintenance of the former régime that the functions of the General Assembly, in its capacity as supervising organ, are limited to those which the Council of the League of Nations in fact exercised before its disappearance. The General Assembly cannot introduce any method of supervision which the Council did not in fact establish, even if it could have done so, in accordance with the terms of the Covenant and of the Mandate. Any such new method would exceed ' the degree of supervision which applied under the Mandates System '.

" This stabilization of the former régime may be explained by the fact that the Court was unable to find any decision that it should be modified at the time of the disappearance of the League of Nations. That no such decision was taken may be fully explained by the expectation that the mandatory States would conclude Trusteeship Agreements, an expectation to which the Court referred in its Opinion. At the time when it gave that Opinion, the Court did not regard this expectation as a forlorn one, since it considered it appropriate to repeat that ' the normal way of modifying the international status of the Territory would be to place it under the Trusteeship System '.

" Having thus come to the conclusion that the criterion of compatibility with the Opinion of 1950 involves reference to the former practice, it is necessary to determine the position in this respect with regard to the hearing of petitioners.

" The hearing of petitioners is not referred to in the Opinion of 1950, which had to determine what were the obligations of the Union of South Africa. The Opinion referred to the obligation to submit to the exercise of supervision: it did not refer to the hearing of petitioners, nor, consequently, to any obligation to accept such hearings. This may give rise to a presumption that such hearings by the Committee on South West Africa would not be consistent with the Opinion of 1950. It may, however, be thought that such a presumption should be submitted to closer consideration.

" The Opinion of 1950 having, as has been said, found that the Mandates System continued to be applicable to South West Africa and that the obligations of a mandatory Power, including the obligation to submit to the exercise of supervision and the maintenance of the system of supervision in accordance with the former practice, except for the substitution of the United Nations for the League of Nations for the exercise of supervision, remained binding on the Union of South Africa, it is necessary to consider what was the position, under the system in force in the League of Nations, with regard to the hearing of petitioners.

" The Court has in this connection made two observations with which we are in agreement. It has stated in the first place that the functions of the Committee on South West Africa are analogous to those of the Permanent Mandates Commission established by the Council of the League of Nations, pursuant to Article 22 of the Covenant: the Court had already so stated in its Opinion of 1955 (*I.C.J. Reports 1955*, p. 72). In the second place, the Court has stated that oral hearings were not granted to petitioners by the Permanent Mandates Commission at any time.

" The Permanent Mandates Commission had, however, been concerned with the question of such hearings and in 1926 it expressed the opinion that in certain cases ' it might appear indispensable to allow the petitioners to be heard by it '. It submitted the question to the Council of the League of Nations, which considered that there was no occasion to introduce this innovation (Resolution of March 7th, 1927).

" The Report, on the conclusions of which the Council of the League of Nations adopted this negative solution, stated, among other things, that it was important that the Commission should have ' at its disposal all proper means for obtaining . . . information '. It thus placed the question on the ground of what the Opinion of 1950 called ' the degree of supervision '. The Report added that ' it would not, however, be desirable to seek to attain this object by means which might alter the very character of the Commission '. It tempered the negative conclusion which it reached, or sought to quiet the fears which that conclusion might arouse in the minds of some, by adding: ' if in any particular case the circumstances should show that it was impossible for all the necessary information to be secured . . . the Council could . . . decide on such exceptional procedure as might seem appropriate and necessary in the particular circumstances '.

" This reservation was not repeated in the Resolution adopted by the Council of the League of Nations. The Council directed the Secretary-General to transmit copies of the Report, of the Resolution and of the replies of the mandatory Powers to the Permanent Mandates Commission.

" In the view of the Rapporteur, consideration of a ' particular case ' such as he envisaged was to be within the domain of the Council of the League of Nations, and it was not a matter in respect of which provision should be made in advance by means of any ' general rules '. It would therefore be contrary to the proposal enunciated by the Rapporteur to proceed by virtue of a delegated power authorizing the Committee on South West Africa to assess the requirements of a particular case and to determine the exceptional procedure warranted by the particular circumstances, or for the General Assembly to proceed on the basis of ' general rules ' authorizing, in greater or lesser measure, the hearing of petitioners. Lastly, it is to be observed that, although the Report was prepared with reference to the question of the hearing of petitioners, ' such exceptional procedure as might seem appropriate and necessary in the particular circumstances ' which it envisages need not necessarily involve hearings, but might consist of something else.

" If it were necessary to determine what were, in the view of the Rapporteur, the powers of the Council, this point would require more detailed consideration. But having regard to the question which has been put to the Court and to what is, in our view, the meaning of the Opinion given by the Court in 1950, it is sufficient for us to observe that the Report had no practical consequences, so far as the hearing of petitioners was concerned, and that the Permanent Mandates Commission continued to refrain from hearing petitioners.

" Since the Opinion of 1950 made reference to the former practice and since the Permanent Mandates Commission did not have recourse to the hearing of petitioners, we are compelled to take the view that such hearings by the Committee on South West Africa would not be consistent with the Opinion given by the Court in 1950.

" In reaching this conclusion, we have not had regard to the fact, noted by the General Assembly in Resolution 749 A (VIII), that the Union of South Africa is not submitting to the exercise of supervision. Consideration of this fact did not appear to us to fall within the scope of an examination of the question put to the Court in the Request for an Opinion submitted to it.

" We do not, however, overlook the fact that the question of the hearing of petitioners by the Committee on South West Africa might be placed on another ground than that of the compatibility of such hearings with the Opinion of 1950. The General Assembly might be led to enquire whether that refusal, which it had noted, of the Union of South Africa to submit to the exercise of supervision by the United Nations did not authorize it to allow the hearing of petitioners, even though it should thereby depart from the Opinion of 1950 which it had adopted as a rule governing its action. Certain considerations of a legal character might enter into an examination of that question: the importance of international supervision under the Mandates System and the obligation of the Mandatory Power to submit to the exercise of supervision, both of which were recalled in the Opinion of 1950. It might also be recalled that, while proposing that the hearing of petitioners should not be sanctioned by any provision more or less general in character, the Rapporteur indicated to the Council of the League of Nations in 1927 that in any particular case it would be open to the Council to ' decide on such exceptional procedure as might seem appropriate and necessary in the particular circumstances '. Whatever the importance of such considerations, they would not be sufficient by themselves to provide an answer to such a question: in considering that question the General Assembly could not avoid taking into account considerations of a political and practical character which are within its own competence and not within that of the Court.

" The question here envisaged, which relates to the possibility of the General Assembly's authorizing the hearing of petitioners even if, by so doing, it should depart from the Opinion of the Court, is, by reason of its object and of the considerations which its examination would involve, different from the question of compatibility with that Opinion. It is the latter question only that the Dissenting Opinion seeks to answer. The answer which we give cannot prejudge the General Assembly's answer to the altogether different question to which reference has just been made.

" For these reasons, it is not possible for us to subscribe to the Opinion now given by the Court."

Declaration by Vice-President Badawi:

" While subscribing to the above opinion, I feel it proper to add the following consideration.

" In fact, the former practice under the Mandates System in respect of the hearing of petitioners was as described in the foregoing opinion. However, the decision of the Council of the League of Nations to communicate to the Permanent Mandates Commission—together with the Resolution of 1927 according to which ' there is no occasion to modify the procedure which has hitherto been followed by the Commission in regard to this question '—the Report on the basis of which that Resolution was adopted and the replies of the mandatory Powers, conferred upon these documents the character of an explanatory note to the Resolution of the Council. The Report should accordingly, in my view, be regarded as forming part of the Resolution.

" Looked upon in this light, the Report made available to the Council, and now makes available to the General Assembly, the possibility, in the particular cases there referred to, of undertaking the hearing of petitioners as such an ' exceptional procedure as might seem appropriate and necessary in the particular circumstances '. Any decision authorizing such a course would essentially be a decision on the particular facts of the case and should be taken by the General Assembly itself wherever it considers that it would be desirable to authorize such a hearing: in other words, any general delegation to another organ of the powers of the General Assembly in this connexion should be excluded."

D—RECOGNITION

[*See also above*, A, IV, Recognition of Acts of Foreign States and Governments; *and* PART IV, JURISDICTION: A, I, Territorial.]

II.—Of Governments

Recognition—Unrecognized Government—Whether a "Government" for Purposes of Construing a Commercial Document—Charterparty—War Risk Clause—Cargo Discharged by Orders of Government in Formosa—Absence of Recognition by British Foreign Office of Government in Formosa—Whether Foreign Office Statement Conclusive on the Court.

MONTA OF GENOA *v.* CECHOFRACHT CO. LTD.

England, High Court of Justice (*Queen's Bench Division*).

(Sellers J.)

June 14, 1956.

THE FACTS.—The defendants, a Czechoslovakian company, chartered the steamship *Marilu*, belonging to the plaintiffs, an Italian company. The charterparty, governed by English law, incorporated the Chamber of Shipping war risks clauses (1) and (2). Clause (2) provided:

> "The ship shall have liberty to comply with any orders or directions . . . given by the Government of the nation under whose flag the vessel sails . . . or by any other Government . . . and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a variation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly".

On July 31, 1953, the *Marilu*, after duly loading a cargo in North China, was bound for Singapore, sailing under the Italian flag. Near Ockou Island and some 800 miles north of Quemoy (both of which islands were then in the hands of the Chinese Nationalists) she was intercepted by a warship flying the Chinese Nationalist colours and escorted by the warship under an armed guard to Keelung, a port in the north of Formosa, where her cargo was discharged on the orders of a general who said that he came from "the Government of Formosa" which had decided to discharge the cargo.

In accordance with the charterparty, 50 per cent. of the freight had been paid shortly after the signing of the bills of lading, and the shipowner claimed to be entitled to the other moiety of the freight. The charterers disputed the claim and the matter was referred to an Umpire in London. Before the hearing, both parties communicated with the British Foreign Office and there were before the Umpire communications from the Foreign Office to the effect that (i) Her Majesty's Government had at all material times ceased to recognize the former Nationalist Government of China as being either the *de jure* or the *de facto* Government of the Republic of China, and (ii) Her Majesty's Government did not recognize that any Government was located in Formosa in July and August 1953. The Italian Government at all material times recognized those carrying on the administration of, and in fact governing, Formosa, as the *de jure* Government of China.

The Umpire found that those carrying on the administration of, and in fact governing, Formosa, were a Government, and that the master, in complying with the orders given to him to proceed and discharge his cargo at Keelung, was complying with the orders of a Government, and held that the shipowner was entitled to the moiety of the freight claimed. The dispute then came before Sellers J. on a case stated by the Umpire.

Held: that the shipowner was entitled to the sum claimed. The Government in Formosa, being a body exercising full legislative and executive powers over an established territory, was a Government in the sense of the clause of the charterparty, and it mattered not that that Government did not embrace, as it claimed, the whole of the Chinese race or the whole territory of China. In this matter the statement from the British Foreign Office was not conclusive, because the charterparty, which fell to be construed as an ordinary commercial document, did not contemplate that the body giving orders or directions should necessarily be recognized as a Government by Her Majesty's Government; and there was no rule of law which restricted the evidence to be considered to that provided by the Foreign Office.

Sellers J. said: " In the circumstances which occurred in the course of the performance of the charterparty and which are clearly found in the award, the shipowner claimed the balance of the freight which he alleged to be due under part 2 of the war risk clause. The award of the umpire would allow the claim in full, but, as the parties desired a case to be stated, the finding is subject to the decision of the court.

" By part 2 of the war risk clause, the ship had liberty to comply with any orders or directions as to destination, delivery or otherwise, howsoever given by the government of the nation under whose flag the vessel sailed or by any other government, and if, by reason of or in compliance with any such orders or directions anything was done or was not done, the same was not to be deemed a deviation, and delivery in accordance with such orders or directions was to be a fulfilment of the contract voyage and the freight was to be payable accordingly. Before her arrest in the course of her contractual voyage the *Marilu* was flying the Italian flag. No orders of the Italian Government arose or were relied on by the shipowner, but the award finds that those carrying on the administration of and in fact governing Formosa were a government, and the master, in complying with the orders given him to proceed to and discharge his cargo at Keelung, was complying with the orders of a government.

" Those findings of fact are conclusive unless they are shown to be based on some error of law or are inconsistent with other findings in the case.

" The arguments of the parties before me are, I think, covered in substance by the submissions to the umpire which are set out in the award, and I do not, therefore, summarize them again.

" The clause on which the claim is based is a war risk clause, and it was submitted on behalf of the charterers that it must be restricted to orders or directions given (a) to preserve ship or cargo from risks of war or apprehension of the same or (b) by or on behalf of a government in the exercise of its belligerent rights. I see no ground for implying such restrictions. Acts of piracy simply by a government (if such could be contemplated) would no doubt be outside the clause, but there is no finding to that effect. On the contrary, the award finds that hostilities were taking place in a somewhat spasmodic fashion between the (communist) Government of the Republic of China and those carrying on the administration of and in fact governing Formosa. Those are symptoms of war, and the risks of such hostilities were apparently sufficient to establish wage increases for the crew whilst the vessel was in Chinese or Korean waters.

" The clause then has to be construed and applies. I would read the words ' by the government of the nation under whose flag the vessel sails or by any other government ' as referring to the same type of government, not to contrasting or different types. The clause refers to national governments, not to a subservient authority such as a municipal or provincial government. The qualities or character required by the body giving the order or on whose behalf it was given or purported to be given must, therefore, include essentially the exercise of full executive and legislative power over an established territory.

" The effect of the clause is, in my view, no more than ' by the government of the nation whose flag the vessel sails, or by any government other than the government of the flag of the vessel,' in each case referring to a national government. That is, the provision is not restricted to the orders of the government of the vessel's flag (from whom, in conditions of war, orders or directions might in the first place reasonably be expected to come). The clause, however, applies to an order or direction of a government and, if the umpire's first finding is right, I would regard the second finding as irrelevant, as it matters not that the government in question does not embrace the whole of the Chinese race or the whole of China, as it apparently claimed to do.

" There would, therefore, I apprehend, have been little if any controversy on the main issue if the Foreign Office of the British Government, from whom evidence was sought, had, at the date of the arrest and deviation, recognized the so-called Nationalist Government of China as being either a *de jure* or *de facto* government of the Republic of China, or in fact the Government of Formosa as a supreme or sovereign and not subservient government.

" In so far as recognition of the Italian Government might matter (and on behalf of the shipowner it was argued that the Italian Government's view prevailed or was of vital importance as evidence) the Italian Government did recognize the Government in Formosa at the material time as the Government of the Republic of China. On the contrary, however, the British Foreign Office stated that Her Majesty's Government did not recognize that any government was located in Formosa in July and August, 1953.

"If the view of the Foreign Office is not to be held as conclusive, or as exclusive of all other evidence, it was not submitted by the charterers that there was no evidence to establish or justify the finding in the award. It was, however, strongly submitted that the court could not go behind or beyond the Foreign Office statement.

" The contract is a commercial document in common use by traders of many nationalities. It is described as a uniform general charter, apparently prepared, issued and recommended by the Documentary Council of the Baltic and White Sea Conference, and adopted by the Documentary Committee of the Chamber of Shipping of the United Kingdom. Of the parties to this charterparty, the shipowner is an Italian, and the charterers are a Czechoslovakian company. The charterers, by clause 40, had the right to transfer the charterparty to a German party but the original charterers were to remain liable for its right and true fulfilment. The charterparty provided for arbitration in London in the event of any dispute, and that permitted the present application to the court under section 21 (1) (*b*) of the Arbitration Act, 1950. The parties were agreed that the proper law of the charterparty was English law.

" As a matter of construction of the charterparty, an ordinary trading or commercial contract, there would seem to me to be no ground for saying that the authority giving the orders or directions has to be a government recognized as such by Her Majesty's Government here. It does not say so and I see no circumstances which require such a construction or which would give rise to any implication to that effect. The umpire, in my judgment, has not erred in that respect.

"Is there a rule of law which restricts the evidence to be considered to that provided by the Foreign Office, or which precludes the tribunal of fact from finding that there was a government in Formosa on all the evidence which was adduced?

"It was urged on behalf of the charterers that the umpire erred in not treating the Foreign Office statement as final and conclusive, and reliance was placed on *White, Child and Beney* v. *Simmons*, ((1922) 11 Ll.L.Rep. 7, 38) and *Duff Development Company Ltd.* v. *Government of Kelantan* ([1924] A.C. 797; 40 T.L.R. 566[1]), and other cases. In my judgement, the authorities, so far as they have been cited or are known to me, do not establish the proposition contended for and did not require the umpire to disregard any of the evidence put before him as to whether or not there was a government in Formosa.

"It seems to me to be a very different question from a sovereign seeking immunity from the jurisdiction of our courts. The principle of the *Kelantan* case ([1924] A.C. 797) was concisely stated by Lord Dunedin ([1924] A.C. 797, 820) in these words:

> 'It seems to me that once you trace the doctrine for the freedom of a foreign sovereign from interference by the courts of other nations to comity, you necessarily concede that the home sovereign has in him the only power and right of recognition. If our sovereign recognizes and expresses the recognition through the mouth of his minister that another person is a sovereign, how could it be right for the courts of our own sovereign to proceed upon an examination of that person's supposed attributes to examine his claim and, refusing that claim, to deny him the comity which their own sovereign had conceded?'

It may well be undesirable that in such a matter a conflict should arise between Her Majesty's Government and a British court. But even on such an issue as that, Lord Sumner, after stating (*ibid.* 824):

> 'a foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed,'

continued later in his speech to say (*ibid.*):

> 'there may be occasions, when for reasons of State full, unconditional or permanent recognition has not been accorded by the Crown, and the answer to the question put has to be temporary if not temporising, or even where some vaguer expression has to be used. In such cases not only has the court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication and the expressions "sovereign" or "independent" sovereign used in the legal rule mean the same thing. Best C.J. says in *Yrisarri* v. *Clement* ((1825) 2 C. & P. 223, 225) that recognition

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[1] See *Annual Digest*, 1923–1924, Case No. 65.]

is conclusive, but, if there is no recognition yet given, the independence becomes matter of proof. I conceive that, if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the court might be entitled to accept secondary evidence in default of the best, subject, of course, to the presumption that, in the case of a new organization, which has de facto broken away from an old State, still existing and still recognized by His Majesty, the dominion of the old State remains unimpaired until His Majesty is pleased to recognize the change.'

" In the *Simmons* case ((1921) 7 Ll.L.Rep. 187; 8 Ll.L.Rep. 170; (1922) 10 Ll.L.Rep. 278; 11 Ll.L.Rep. 7; 38 T.L.R. 616), on which both parties seemed to rely, a question arose whether a claim for loss of insured property was a loss or confiscation by the government of the country in which the property was situated. The matter arose at the time of the Russian revolution. Roche J. (10 Ll.L.Rep. 278) had held that the evidence, from all sources, had not established that the Russian Soviet Republic was at the time of the loss recognized as a sovereign government and that the claim succeeded as the loss was a loss ' by rebellions, military or usurped power ' within the meaning of the policy. The loss or confiscation by the government would have defeated the claim as outside the policy. Apparently the Soviet Authority was not recognized by our Government at the time of the loss, but was recognized at a later date, and the Court of Appeal held in these circumstances that the court could look at all the facts and see whether the government recognized as the *de facto* government of Russia was or was not the *de facto* government of Russia at the earlier material date. The British Foreign Office had declined to state the precise date at which the existing Soviet Authority came into being as a government, and therefore the Court of Appeal held that it became a question of fact as to when that government first began to exist as a government, and that the court was entitled to give effect to the evidence even if it was inconsistent with the opinion given by the Foreign Office (*per* Atkin L.J.). (11 Ll.L.Rep. 7, 13, 14.)

" Apparently, the government situated and functioning in Formosa was at one time recognized by this country, and it does not follow because recognition had ceased that the government, once recognized, has in any way altered its activities or lost such powers and authority as it had been exercising. Without the recognition of our Government in the *Simmons* case (11 Ll.L.Rep. 7) it might well have been impossible for the court to have found on the evidence that the usurping forces had reached such ascendancy that they had supplanted the existing government. It was held that the usurping forces had supplanted the existing government at a time when our country had not recognized the substitution, and it does not appear to me to be an authority for the proposition that if there is no recognition there is no government. Nor would it seem that recognition or non-recognition would in any way affect the risk of a vessel being accosted on her voyage.

" I would hold that the umpire was entitled to approach the question in the same manner as Goddard J. did in *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham Steamship Co. Ltd.* ([1939] 2 K.B. 544, 549; 55 T.L.R. 503; [1939] 1 All E.R. 819[1]) approved by the Court of Appeal, and that the reasoning of the judgment of Greene M.R. ([1939] 2 K.B. 544, 552) is largely applicable to this case. It was held there that the question whether on the true construction of the charterparty war had broken out involving Japan was not conclusively determined by the view of His Majesty's Government. Goddard J. is reported as having said (*ibid.* 549):

> ' that what he had to determine was what the parties meant by the clause of the charterparty. He thought they were using the word " war " and intended it to be construed as war in the sense in which an ordinary commercial man would use it. He did not think the parties in a case of this sort were going into the niceties of international law.'

And, may I add, as applicable to this case, into the niceties of diplomacy.

" Other arguments were advanced on the first issue with which I do not think it necessary to deal, having regard to the conclusions already expressed. But I should record that Mr. Ashton Roskill, for the charterers, expressly kept open the point, though he could not successfully argue it in this court, that the war risk clause (2) was unenforceable, being repugnant to the fundamental obligations of the contract.

" There remains for consideration the amount of freight which the shipowner is entitled to receive under the clause, which provides that in the circumstances set out, if, in compliance with any such orders or directions ' anything is done or is not done, the same shall not be deemed to be a deviation and a delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly.' By clause 20 of the charterparty a variety of possible voyages was contemplated with freights varying according to the destination ultimately chosen. By clause 26 a declaration of destination had to be made, ' on or before passing Aden if discharging Black Sea, on or before vessel's passing Gibraltar for any other port.' A declaration was made as to deadweight capacity under clause 36. But in the events no declaration was made as to a discharging port, and the shipowner claims on the basis of the lowest rate of freight provided for by clause 20.

" The freight is to be paid on the basis of the fulfilment of the contract voyage. If this had been declared the claim would have been for the freight due for the declared destination and could not have been less than the minimum rate stipulated. The deviation might be of short duration, and the actual voyage might also be short, as here. But, on the other hand, the time of deviation or detention might be long, and the distance much more remote than any of the contemplated voyages. The rough goes with the smooth, and the contractual rate stands as if the contract voyage had been fulfilled.

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[1] [See *Annual Digest*, 1938–1940, Case No. 201.]

" It was argued that the phraseology of part (1) of the war risks clause was different from part (2) with regard to freight. But, as I read it, it likewise gives the shipowner the freight appropriate to the contractual voyage as originally ordered, notwithstanding that the ship has been diverted to another port covered by the charterparty.

" For these reasons I hold that the shipowner is entitled to recover the sum claimed and provisionally awarded to him by the award and that the charterers are not entitled to recover at all on their counterclaim.

" Award affirmed."

[Report: L.R. [1956] 2 Q.B. 552.]

States—Recognition of—Recognition of Governments—Effect of Non-Recognition—Deportation to Territory Controlled by Unrecognized Government—Necessity for Prior Inquiry—The Law of the United States of America.

See p. 397 (*United States ex rel. Tom Man* v. *Shaughnessy*).

E—STATE SUCCESSION

I.—Succession to Rights

State Succession—Succession to Rights—Two Successive Succession States—Effective Date of Subrogation—Relevance of Dates of Coming into Force of Peace Treaties.

See p. 632 (*Lighthouses Arbitration between France and Greece—Counterclaim to Claim No.* 4).

II.—Succession with Regard to Contractual and Other Obligations, and Concessions

State Succession—With Regard to Concessions—Effect of Treaty Provision—Division of Rights and Obligations under Concession —Right of Successor State to Predecessor State's Portion of Profits.

Lighthouses Arbitration between France and Greece.

Claim No. 8 (*Second Part*).

Permanent Court of Arbitration. July 24, 1956.
(Verzijl, President; Mestre, Charbouns.)

The Facts.—(See *infra*, p. 659.) As to the first part of this claim, relating to the period of the Greek belligerent occupation of Salonika in 1912 and 1913, see *infra*, p. 806. The Tribunal now considered the position of monies paid in to the Greek Treasury after August 25, 1913, and claimed by Collas & Michel.

Held: that the claim must fail. In view of the provisions of Article 9 of Protocol XII of the Treaty of Lausanne, 1923, Greece had the right as successor State to Turkey to retain the latter's part of the lighthouse dues.

The Tribunal said: " The situation as regards the constraint exercised in 1912 by the Greek authorities on the firm to make them pay into the Greek Treasury the receipts at Salonika (examined in [*Claim No.* 8 (*First Part*) [1]]) is completely changed in its juridical aspect once the régime of occupation is replaced by Greek territorial sovereignty (August 25, 1913). After that date, Greece was subrogated, by the delayed retroactive effect of Article 9 of Protocol XII[2] of the Treaty of Peace of Lausanne of 1923, to the Ottoman Empire in all the rights and obligations of the latter in regard to the concession. The *modus vivendi* which was in question in [the first part of this claim] . . . continued to regulate provisionally the relationship between the Greek Government and the firm: a final settling of accounts was provided for, but that settlement never took place. After August 25, 1913, it ought to have been effected on the basis of the concession (sharing of gross receipts after deduction of the amount of any damages which might be caused by *force majeure*, in the proportion of nine-sixteenths and seven-sixteenths, respectively), subject always to the assignment previously made by the Ottoman Government of its own portion to its creditors.

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[1] See *infra*, p. 806.]

[2] Article 9 of Protocol XII provided that a State succeeding to Turkish territory shall be subrogated as regards the rights and obligations of Turkey " in territories detached from Turkey after the Balkan wars so far as regards concessionary contracts entered into with the Ottoman Government or any Ottoman local authority before the coming into force of the treaty providing for the transfer of the territory ".]

" The division mentioned above between the Government and the concessionaires is itself subject to another division between Greece and Turkey. One might ask, in fact, in what way the latter division ought to be effected: in accordance with the proportion of the length of the coast of New Greece to that of the total length of the coast of the former Ottoman Empire before its dismemberment—as the Greek Government suggested in another context (see the Greek Counterclaim No. 7[1] . . ., *viz.*, in the proportion 2 : 7)—or simply according to the place of collection. The Tribunal adopts the latter solution. There is, in fact, nothing to suggest that Article 9 of Protocol XII of [the Treaty of] Lausanne envisaged a method of dividing the rights and obligations under the concession among the Succession States other than that of adaptation to the new division of Turkish territories into distinct national geographic units. It is thus clear that the division of rights and obligations arising out of the concession follows principles other than those which were applied to the division of debts.

" For the period following that of the military occupation, Greece would have had the right to retain the grantor's part of the moneys received, if that part had not been alienated by the Turkish Government. On that point the situation is identical with that which has been analyzed . . . under [*Claim No.* 8 (*First Part*)[2]]."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 95.]

[[1] Not here reported.]
[[2] See *infra*, p. 806.]

State Succession—Succession with Regard to Contractual Obligations and Concessions—Responsibility for Expenditure on Contract Rendered Abortive by Act of Predecessor—Contributory Negligence of Claimant—Relevance of Question Whether Debt Admitted, Liquidated or Easily Ascertainable—Responsibility for Breach by Predecessor of Concession Contract—Relevance of Privity of Successor State—Merger of Crete and Greece—Critical Date—General Question of Transmission of Responsibility on Territorial Change—Arbitration—Previous Decisions of Permanent Court of International Justice Regarded as *Res judicata*—Article 59 of Statute of the Court—Article 84 of Hague Convention for Pacific Settlement of International Disputes, 1907—Relevance of Distinct Nature of *Lis*—Relevance of Differing Basis of Previous Judgment—Relevance of Terms of *Compromis* Leading to Previous Judgment.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claims No. 11 *and* 4.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *infra*, p. 659.) These claims related respectively to the expense caused to Collas & Michel by an order given to them by the Government of Crete in 1903 to prepare the construction of two new lights, one at Spada and one at Cryo (the latter taken in 1904 to Elaphonissi), which order was countermanded in 1908 (Claim No. 11), and to the exemption of the Greek ship *Aghios Nicolaos* from payment of the normal light dues, ordered by a Cretan Law of 1908 which was kept in force until 1914 (Claim No. 4). The Tribunal decided to deal with both claims together, observing, however: " Although these two claims have in common the point that they both raise the juridical problem of the responsibility of Greece as successor State of the autonomous State of Crete, they present characteristics which differ and which are peculiar to each and which justify separate juridical analysis, the more so since one of them [No. 4] presents the problem of a counterclaim by Greece."

As to Claim No. 11.—The relevant facts were fully set out in the proceedings in 1937 before the Permanent Court of International Justice.[1] On December 16, 1903, the Cretan Government *Conseiller* for the Interior, in pursuance of a resolution of the previous June 15 of the Cretan Assembly, asked the firm's representative at Canea to set up two new lighthouses, which had become highly desirable after the terrible wrecking of the Austrian-Lloyd steamer " Imperatrice " off the coast of Crete. After the communication of this wish of the Cretan Government to the Lighthouse Administration at Constantinople, the latter put itself in touch with the Turkish Admiralty in September 1905 and obtained an opinion favourable to the erection of the proposed lights. After this, Collas & Michel undertook surveys at the site to enable them to submit a definitive plan, which they laid before the Ottoman Government at the end of May 1908, with a request for credits. After repeated approaches by the Cretan Government to the firm, and by the latter and also by the Great Powers, to the Ottoman Government, the latter finally granted the necessary credits. But then the attitude of the Cretan Government changed; it made its authorization subject to conditions with which the firm was not able to comply because of the political questions raised, the Cretan Government requiring the firm to substitute it for the Turkish Government and to remit to it the part of the receipts previously belonging to that Government. Despite fresh representations of the Great Powers made between 1908 and 1911 both to the Greek High Commissioner in Crete and to the Ottoman Government, the matter rested there. The firm did not receive any compensation for the expenses to which it was put as a result of the change of position of the Cretan authorities. They now claimed some 46,000 Piastres against Greece as successor of the former autonomous State of Crete.

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[1] *P.C.I.J.*, Series C, No. 82, pp. 36 *et seq.* [See *Lighthouses in Crete and Samos Case*: *Annual Digest*, 1935–1937, Case No. 49.]

While contesting the amount claimed as being considerably exaggerated, Greece had at various times—during the proceedings before the Permanent Court of International Justice, through the Ministerial Commission of 1935, and during the negotiations of 1938—admitted the justice of a claim by Collas & Michel to receive under this head compensation equal to their actual losses. Even during the present proceedings the Greek Government had not contested the claim in any way but appeared even to have recognized it implicitly. It was not until in the course of his address on May 10, 1955, that the Agent for the Greek Government opposed it. The defence doubtless realized the advantages which the acceptance in its entirety of the second Judgment of the Permanent Court of International Justice[1] could afford to it by the juridical consequences which it implied. This possibility raised the question of the extent of the authority to be ascribed to that Judgment, and the same point arose in connection with Claim No. 4, the facts in which are as follows:—

Claim No. 4.—The origin of this claim lay in a Cretan Law of July 20, 1908, ratifying an agreement concluded on July 19, 1908, between the Cretan Government and a shipping company established in Greece to exercise a coasting trade around the island of Crete. The object of this agreement was to confer on the company a monopoly of *cabotage*, with express exemption from the normal payment of any light dues to the firm of Collas & Michel under the latter's concession. The Greek Government never used its influence to put an end to this situation (which was a direct infringement of the firm's rights) either with the Cretan Government or with the shipping company, whose vessel, the " Aghios Nicolaos ", flew the Greek flag and was registered at the Port of Piraeus. On the contrary, the Greek Government tolerated the continuance of this situation after Greece had definitively acquired supreme power—at first *de facto* and later *de jure*—over the island of Crete. Collas & Michel had for some time been claiming from the Greek Government adequate compensation for the clear infringement of their concession rights caused by the unlawful activity of the former autonomous State of Crete.[1]

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[1] *Lighthouses in Crete and Samos Case*: *P.C.I.J.*, Series A/B, No. 71; *Annual Digest*, 1935–1937, Case No. 49.

In this case, as in Claim No. 11, the Greek authorities at first recognized in principle the responsibility of Greece for the loss thus caused to Collas & Michel; they did not change their attitude until a late stage in the present proceedings. It was only in their counter-memorandum that the claim was for the first time rejected as " passing all the bounds of logic " because it implied a demand that Greece should " assure the debts of the former Ottoman Empire on the ground that, five years after the voyage of the vessel to Crete, that island became Greek ".

Held: that Claim No. 11 must fail, but Claim No. 4 must succeed. Neither the Judgment of the Permanent Court of International Justice of 1934 [*Lighthouses Case between France and Greece*[2]] nor that of 1937 [*Lighthouses in Crete and Samos*[3]] were binding as *res judicata* on the Tribunal. They were rendered on the basis of a particular provision of a treaty and of a carefully drawn *compromis*; and they left open certain questions which were presently relevant.

Claim No. 11.—The responsibility for the abortive expenditure lay between Collas & Michel, who had failed to take sufficient precautions, the Cretan Government for its refusal to give permission to build the lighthouses save under an unacceptable condition, and the Ottoman Government for its failure to ensure the construction of the lights. No responsibility fell on Greece as successor State to either Crete or Turkey. In any event, the claim was not admitted by either of those States, nor was it liquidated or easily ascertainable.

Claim No. 4.—Greece must be regarded as successor State to the dues and concessional charges of both Turkey and Crete, and was therefore responsible for the breach of the concession contract involved in granting the shipping exemption from paying light dues to Collas & Michel.

The Tribunal said: " It is here that the core of the controversy appears: on which of the two States, Turkey or Crete, does the debt fall? and can the debt be regarded as having passed to Greece, either as successor State of the former Ottoman Empire or as successor State of the former autonomous State of Crete? In this respect, the defence raised against Claim No. 4 presents the same characteristics as that raised against Claim No. 11 set out above. But these material questions of law are in turn subordinated to the prime question whether the Tribunal is in this matter faced with an international decision which has already resolved them and which, in consequence, it is bound to follow. Although it would hesitate before venturing to interpret the exact scope of a Judgment of the Permanent Court of International Justice in order to decide how far it constitutes an authoritative precedent for questions raised in other proceedings, the Tribunal sees no way of escape from the duty of declaring itself regarding that case, seeing that it dominates Claims No. 11 and 4. It is therefore compelled to deal with this difference.

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[1] See *P.C.I.J.*, Series C, No. 82, pp. 39 *et seq.*

[[2] *P.C.I.J.*, Series A/B, No. 62; *Annual Digest*, 1933–1934, Case No. 36.]

[[3] *P.C.I.J.*, Series A/B, No. 71; *Annual Digest*, 1935–1937, Case No. 49.]

" With what exactly did the two cases before the Permanent Court of International Justice deal? In the first proceedings, in 1934,[1] the question at issue was whether the contract of April 1/14, 1913, between Collas & Michel and the Ottoman Government extending (for the third and last time) the lighthouse concession (previously extended, for the second time, in 1894, as from 1899) from September 4, 1924, for a period of 25 years ' [was] duly entered into and is accordingly operative as regards the Greek Government *in so far as concerns lighthouses situated in the territories assigned to it after the Balkan Wars or subsequently.*' The reply given to this question by the Court in the course of its Judgment of March 17, 1934, was in the affirmative. The Court, however, was at pains at the end of its Judgment to reserve its opinion on a particular point, insufficiently argued by the parties, namely: ' which are the territories detached from Turkey and assigned to Greece after the Balkan Wars or subsequently, and where are the lighthouses in regard to which the contract of 1913 is operative '—the reservation applied particularly to the autonomous island States of Crete and Samos. Hence the second proceedings[2] commenced in 1936 under a new *compromis* in which the parties, in order to indicate the question of law to be resolved, repeated textually the formula used in 1934 with this exception, that the part of the last sentence of the question of law to be dealt with (in italics above) was replaced by the words ' *in so far as concerns lighthouses situated in the territories of Crete, including the adjacent islets, and of Samos, which were assigned to that Government after the Balkan Wars* ', and they preceded their request to the Court to give its decision on that question by the words ' taking into account the periods at which the

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[[1] *Lighthouses Case between France and Greece* (*supra*).]
[[2] *Lighthouses in Crete and Samos Case* (*supra*).]

territories in question were detached from the Ottoman Empire'. [According to the view of the Greek Government, contrary to that of the French Government, the two islands had already been detached from Turkey before their incorporation into Greek territory in 1913, so that the contract of 1913 could not in any event relate to the lighthouses on those islands. For the rest, the two parties were at one in regarding the new question 'as accessory to the principal question which has already been decided by the Court' and 'as relating to the applicability in a particular case of the Judgment already rendered by the Court".[1]]

"The authority of *res judicata* attaching to the first Judgment and the drawing up of the second *compromis* led the Court to interpret very restrictively the common opinion of the parties at the time of the submission of the new question to the Court—an opinion according to which there was one reason, and one only, why the principle enunciated in the Judgment of 1934 could not apply to Crete and Samos, namely, that those two islands were already detached from the Ottoman Empire before 1903 and, in consequence, by that year any political link between the islands and Turkey had disappeared. In the opinion of the Court,[2] there was no reason to admit the hypothesis of an interruption in the sovereignty over the islands, the detachment from Turkey and the assignment to Greece having taken place simultaneously. Nor was there any reason, according to the Court, to enter into the question whether the autonomous status of the islands, or of one of them, which had been achieved well before 1913, excluded for the future the validity, according to imperial Ottoman law, of a concession contract, even though 'duly entered into' according to Turkish constitutional law, which had been entered into by the Government at Constantinople without the active participation of the Government of the islands, for the reason that the Turkish Government had lost the right to conclude of its own authority contracts of this kind.

"The question is therefore quite simply that of ascertaining the precise moment at which the last political link between these islands and the Ottoman Empire was broken. That being the factual situation from the point of view of the existence or non-existence of a *res judicata* in relation to the present arbitration, it must be observed in the first place that there can be no question of *chose jugé* in the strict sense of the term.

"The present case is governed by Article 59 of the Statute of the former Permanent Court of International Justice, which is identical with Article 59 of the Statute of the [International Court of Justice] but which differs from Article 84 of the Hague Convention [for the Pacific Settlement of International Disputes] of October 18, 1907, relating to the obligatory nature of an arbitral award, in so

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[[1] *Lighthouses in Crete and Samos* (*supra*).]
[[2] *Ibid.*: see *P.C.I.J.*, Series A/B, No. 71.]

far as the binding effect of a Judgment of the International Court of Justice is limited not only to the parties to the case but also, in express terms, to the case which has been decided. Now, although in the present arbitration the parties are the same as in the judicial proceedings of 1937—for, as the Tribunal has established above, in both instances it is France and Greece who are at issue—the *lis* which was decided in 1937 is quite distinct from those which are the objects of the present claims Nos. 11 and 4. The latter have their origin in events which occurred well before the last extension of the concession contract the validity of which was the sole object of the dispute which came before the Permanent Court of International Justice in 1937 and which was decided by its Judgment of October 8. On the contrary, the present claims arose under the concession of 1894 (second extension), the validity of which has never been in dispute. There is therefore in neither matter identity of *lis* (or concrete disputes) to be resolved; there is only identity of parties.

" If there can be no question of *res judicata* in the strict sense of the term, one may be permitted to wonder whether the principle of *res judicata* could not be admitted in a broader and less formal sense. Such a viewpoint could be based on three different considerations. First, one could say—arguing juridically—that the authority of *res judicata* attaches not only to the operative part [*dispositif*] of a judgment but also to the reasons which preceded it and which contributed to its drawing up [*libellé*]. But, apart from the consideration that to enter upon such a course would be equivalent to setting oneself in some measure against another, earlier, decision of the Permanent Court of International Justice itself, contained in its Advisory Opinion of May 16, 1925, regarding certain questions relating to the *Polish Postal Service in the Port of Danzig*,[1] the reasons for the Judgment of 1937 (concerning the exact moment of the final rupture of any political relationship of suzerainty between Crete and the Ottoman Empire) appear to the Tribunal to be too remote from the arguments which ought to govern the resolving of disputes relating to the present claims Nos. 11 and 4, to enable it to decide on their disposal.

" One could, moreover, maintain—also arguing juridically—that the text of Article 59 of the Statute of the International Court of Justice and of the instrument which preceded it is badly drafted and that one must necessarily interpret it in a more liberal sense than its terms appear to justify. There is much to be said in favour of this thesis, the more so since the provision in question was not taken from the draft of the Committee of Jurists which drew up the Statute of 1920, but was distorted by an unfortunate amendment by a political body. If it were true that a Judgment of the Court is

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[[1] *P.C.I.J.*, Series B, No. 11, pp. 29 and 30; *Annual Digest*, 1925–1926, Case No. 49.]

clothed with the authority of *res judicata* only in the case which has been decided, that would mean that, if the *lis* concerns the interpretation of a clause of a treaty, the interpretation given could be used again in arguments in any future *lis* concerning the same clause of a treaty. Such a result would not only be absurd; it would put Article 59 in irreconcilable contradiction with the last sentence of Article 63 of the same Statute, which provides that when a third State intervenes in a case in which there is in question the construction of a multilateral convention to which it and the States concerned in the case are parties, the construction given by the Judgment will be equally binding on that State. The *res judicata* extends, in consequence, beyond the strict limits of the case decided. Are there in fact in the Judgment of 1937 elements which are equally decisive for the present claim? The Tribunal thinks not.

" One could then say—arguing logically—that if the Judgment of 1937 declares that the island of Crete at the beginning of 1913 still formed part of the domains of the Sultan, the island must *a fortiori* have done so in the year 1908 and in the following years, with all the juridical consequences which that conclusion would have for the present claims Nos. 11 and 4.

" How does this matter appear on a profounder analysis? The Tribunal has not been able to decide that the Judgment of 1937 is a precedent for solving the present disputes. The Judgment of 1937, just like that of 1934, was rendered on the basis of a particular provision in a treaty (Article 9 of Protocol XII of the Peace Treaty of Lausanne) and of a *compromis* drafted in strict terms which, combined, make—according to the interpretation of the Court—the validity of the third contract, dated April 1/14, 1913, extending the concession depend, on the one hand, on its compatibility with Ottoman constitutional law (was the contract ' duly entered into '?) and, on the other hand, on the question of the precise moment at which the last political link between the Islands of Crete and Samos and the Ottoman Empire disappeared (at what date were the islands ' detached from the Ottoman Empire '?). The latter moment was fixed by the Court at a date in any event subsequent to the conclusion of the prolongation agreement in question, the Court leaving it undecided whether it was May 17/30, 1913, the date of the signature of the general Treaty of Peace of London, subject to ratification but never ratified and having entered into force immediately only as regards the relations between Bulgaria and Turkey under a special Protocol—or November 1/14, 1913, the date of the bilateral Greco-Turkish Treaty of Athens, which was also subject to ratification but which came into force immediately after its signature by virtue of Article 16 of the Treaty, and which maintained, in Article 15, the provisions of the said Treaty of London. In giving its reasons for its decision, the Court expressly made the date of the disappearance of the last Creto-Turkish political links coincide with the assignment of the island to Greece, but it refused absolutely to enter into an examination of the extent of the régime of wide autonomy granted to the island before 1913, except from the point of view of its importance for the specific problem of the final ' detachment '.[1] In consequence, the international effects of the said régime of wide autonomy from all other points of view were set aside by the Court in express terms and it is precisely that régime of autonomy which plays an important role in the solution of the dispute raised by claims Nos. 11 and 4.

" This negative finding relative to the existence of a *res judicata* does not, however, decide the points of law submitted to the Tribunal. We must, therefore, now return to the said claims separately.

" *Claim No.* 11.—The Tribunal must first enquire on whom fell the financial responsibility for the Cretan order and countermanding order concerning the construction of lighthouses at Spada and Elaphonissi.

" When, in December 1903, a representative of the autonomous Government of Crete asked the firm of Collas & Michel to construct two new lighthouses on the island, the firm did not wish to comply with this request without first informing the competent authorities of the Ottoman Empire about it, evidently with the principal object of ensuring that the expenses which would be involved in the construction would be repaid to them. In fact, since 1899 the firm had no longer been under an obligation to build new lighthouses at its own expense. At that time, the Ottoman Government still regarded itself as the only authority competent to take decisions on the subject of the lighting of the Cretan coast and it finally opened a credit in favour of the firm to enable it to proceed to the construction of the two lighthouses at the expense not of the Cretan budget but of the Ottoman budget. To set off this opening of a credit, the Ottoman Government regarded itself as being entitled to that part of the dues received by the firm's Cretan agencies which belonged to the State granting the concession—a claim which had at an earlier stage been recognized by the Great Powers as being in order. But it was on this point that [the project for] the construction of the two new lighthouses failed: in effect, the Cretan Government ended by making its permission to build them subject to the condition that in future the firm would pay the State's part of the receipts from the lighthouses on the island of Crete not to the Ottoman but to the Cretan Treasury—evidently considering that the setting up of the Island of Crete as an autonomous State had brought about, in accordance with international public law, its succession to the rights formerly accruing to the Ottoman Empire as the State granting the concession on March 5/17, 1897.[2] It is conceivable that the firm, quite naturally

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[[1] *P.C.I.J.*, Series A/B, No. 71, p. 103.]

[2] See the letter of the Cretan Government reproduced in *Publications of the Permanent Court of International Justice*, Series C, vol. 82 (1937), pp. 196 and 197.

sharing the way of thinking of the Ottoman Government—which it had already anticipated in applying to that Government in regard to the request of the Cretan Government—did not feel that it ought to accept the latter's conditions.

"That being so, on whom falls the prime responsibility for the abortive initial expenses incurred by the firm before the final refusal of the Cretan Government?

"One part of the responsibility falls on Collas & Michel themselves; they undertook somewhat rashly preparatory work which was not necessary without first assuring themselves as to the eventual financial consequences.

"Another part of the responsibility falls on the Cretan Government of that time; its final refusal was in manifest contradiction with its original demand—it had not in any way disclosed the condition which it would eventually impose on the firm and that condition was itself unwarranted.

"A third part of the responsibility falls on the Ottoman Government of the day: recognizing, on the insistence of the Great Powers, the necessity for the construction of the two new lighthouses in the general interest of navigation and regarding itself as the sole authority competent to decide on that construction, it ought to have taken the necessary measures—possibly with the assistance of the Great Powers—to assure it.

"In view of this division between the three parties concerned of the responsibility for the events of 1903 to 1908, the Tribunal sees no real reason to saddle, after the event, Greece, who had absolutely nothing to do with the dealings between those parties, with this responsibility, in whole or in part. Not even the part of the general responsibility for the events of 1903 to 1908 to be imputed to the autonomous State of Crete can be regarded as having devolved upon Greece. Such a transmission of responsibility is not justified in the present case either from the particular point of view of the final succession of Greece to the rights and obligations of the concession in 1923/1924—if only for the reason that the said events took place outside the scope of the concession—or from the more general point of view of its succession in 1913 to the territorial sovereignty over Crete.

"The connection between this territorial succession, on the one hand, and the order and cancellation by the Cretan Government in 1903 and 1908 respectively, on the other hand, are too remote to justify a decision which would fix Greece and Greece alone with the general responsibility for the acts and omissions of others who were complete strangers to her.

"Moreover, we are here dealing with a claim which was neither recognized as well founded by the Ottoman Empire or by Crete nor determined by a competent tribunal nor liquidated or easily liquidable on the basis of the facts giving rise to it.

" Claim No. 11 must therefore be rejected.

" *Claim No.* 4.—In the case of claim No. 4, the situation is presented in a totally different fashion. In this case, three aggravating circumstances which do not in any way apply to claim No. 11 have to be taken into consideration. In the first place, the attitude of Crete, which consisted of exempting a private company from the payment of dues, was diametrically opposed to the terms of the concession contract which was binding on her either as an autonomous State, successor to the concession for Cretan territory, or as a territorial subdivision of the Ottoman Empire; and she was clearly conscious of that fact, as witness her explicit promise to indemnify the navigation company, to whom she had granted a concession for coastal trade around the island of Crete, against unpleasant consequences which might result to the latter from the patent violation of the concession [to Collas & Michel].

" Secondly, the concession for the coastal service around Crete, which included one clause and certain consequences which were incompatible with the lighthouse concession for the whole of the coasts of the Ottoman Empire, was given to a Greek shipping company registered at Piraeus, under the very eyes, that is, of the Greek Government which, in view of its close relationship with the autonomous State of Crete, must have been aware of what was going on in that island.

" Finally, far from doing anything to check or prevent its shipping company from lending itself to these illegal transactions, Greece, on the contrary, kept in force and thus sanctioned the illegal practice under its own direct responsibility after the acquisition of territorial sovereignty and until 1914. It cannot be doubted that in acting in this way Greece undertook a responsibility of its own for the period subsequent to the acquisition of sovereignty at the end of May 1913.

" Are the considerations set out above equally conclusive to make Greece responsible for the violation of the concession prior to the said date from which one of her shipping companies has wrongly profited? For the reasons indicated under A above, with regard to Claim No. 12 (a),[1] no such responsibility can be placed on the succession of Greece to the concession in virtue of the special clause contained in Article 9 of Protocol XII annexed to the Treaty of Peace of Lausanne. It could result only from a transmission of responsibility in accordance with the rules of customary law or the general principles of law regulating the succession of States in general. The fact that the special provision of Protocol XII defined the extent and the starting point of the succession of Greece to the dues and concessional charges of *Turkey* does not in itself prevent Greece

[[1] See *infra*, at p. 107.]

from being regarded as having succeeded similarly, but on other grounds, to the corrresponding dues and charges of the autonomous State of *Crete*.

"Seen from this point of view, the question of the transmission of responsibility in the event of a territorial change presents all the difficulties of a matter which has not yet sufficiently developed to permit solutions which are both certain and applicable equally in all possible cases. It is no less unjustifiable to admit the principle of transmission as a general rule than to deny it. It is rather and essentially a question of a kind the answer to which depends on a multitude of concrete factors.

"Is it a matter of contractual or delictual obligations? Of private or of public law?—recognized or disputed?—liquidated or unliquidated? . . . Is it a matter of the complete dismemberment of a pre-existing State, of the secession of a colony or of a part of a State, or is it rather a matter of the merger of two previously independent States, of the incorporation of one State in another? To what point, in the last-mentioned hypothesis, should one, in order to resolve the problem, take into account the more or less close relationship between the incorporating State and the incorporated State, or the voluntary or involuntary nature of their union?

"It is possible that a solution which is perfectly adequate for the essential element of a given hypothesis will appear quite inadequate for those of another. It is impossible to formulate a general, identical solution for every imaginable hypothesis of territorial succession, and any attempt to formulate such a solution must necessarily fail in view of the extreme diversity of cases of this kind. That is why the Tribunal does not attach a decisive importance to the rare and disparate precedents of international or municipal courts and why it does not accept as being, in general, conclusive either the decision (No. 27 of 1924) of the Greek Court in regard to the Islands of the Aegean Sea[1] recognizing the transfer to Greece herself of responsibility in the matter of purely delictual obligations, nor the decisions of the British-American Claims Arbitral Tribunal of November 23, 1923, and November 10, 1923,[2] denying such a transfer of responsibility in the comparable cases of the annexation by force by Great Britain of the State of Transvaal and of the incorporation in the United States of the Hawaiian archipelago. The variety of possible hypotheses of territorial succession, the political considerations which often govern the solution of juridical problems relative thereto, and the rarity of arbitral or judicial decisions resolving the problem in a really clear and unequivocal manner after convincing argument heard, explain both the vagaries of international practice and the chaotic state of authoritative writings.

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[1] *Thémis*, vol. 35, p. 294 [*Annual Digest*, 1923–1924, Case No. 36, *sub nom. Samos (Liability for Torts) Case*.]

[[2] See *Annual Digest*, 1923–1924, Case No. 35, *sub nom. Robert E. Brown Case*.]

"In the present case, we are concerned with the violation of a term of a contract by the legislative power of an autonomous island State the population of which had for decades passionately aspired to be united, by force of arms if necessary, with Greece, which was regarded as the mother country—a violation which was recognized by the State itself as constituting a breach of the concession contract, which was effected in favour of a shipping company belonging to that same mother-country, which was endorsed by the latter as if it had been a regular transaction and which was eventually continued by her, even after the acquisition of territorial sovereignty over the island in question. In these circumstances, the Tribunal can only come to the conclusion that Greece, having adopted the illegal conduct of Crete in its recent past as autonomous State, is bound, as successor State, to take upon its charge the financial consequences of the breach of the concession contract. Otherwise, the avowed violation of a contract committed by one of the two States, linked by a common past and a common destiny, with the assent of the other, would, in the event of their merger, have the thoroughly unjust consequence of cancelling a definite financial responsibility and of sacrificing the undoubted rights of a private firm holding a concession to a so-called general principle of non-transmission of debts in cases of territorial succession, which in reality does not exist as a general and absolute principle. In this case the Greek Government with good reason commenced by recognizing its own responsibility.

"In the foregoing exposition, the Tribunal started with the premise that the acts of the Cretan authorities of 1908 constitute the breach of a contractual provision. The Tribunal is anxious to add to that exposition *argumenti causa* that even if the debt thus created by the breach of a contractual provision is regarded as a delictual or quasi-delictual obligation because it originated in an illegal act of the State, the conclusions arrived at would not be different. The thesis, one of theory rather than of practice, that there can never be a question of transmission—or more accurately, of transfer, since it is not here a matter of the effects of acts of human will, but rather of the automatic and lawful consequences of territorial changes—of delictual obligations to the successor State is not, in general, well founded. Here again, the solution must depend on the particular circumstances of each case. An obligation created by an international delict properly so-called, committed in direct violation of the law of nations, such as the invasion of a neutral territory or the arbitrary destruction of a vessel exempt from capture, is something quite different from an obligation which has an origin in private law or in administrative law and which gives rise to an international claim only in consequence of a denial of justice. The hypothesis of the voluntary union of two independent States in one unitary or federal State differs essentially from that brought about by the annexation of one State by another by force of arms. The dismemberment of a unitary State into two or more new States presents certain characteristic features which differ from those inherent in the secession of a colony from the mother country as a new independent State. All these differences cannot but exercise a decisive influence on the solution of the problem of State succession even in cases of delictual obligation. What justice, or even what juridical logic, would there be, for example, in the hypothesis of an international wrong committed against another Power by a State which subsequently splits up into two new independent States, in regarding the later as being free from an international obligation to make compensation which would without any doubt have lain on the former, predecessor, State which had committed the wrong? Certain tendencies among writers clearly necessitate reconsideration by reason of the different kinds of possible delictual obligations and the diversity of possible hypotheses of territorial succession.

" The doctrinal argument which is sometimes invoked by certain German writers in support of the theory of the non-transmission of delictual or quasi-delictual obligations, that such debts present a character ' in the highest degree personal ' (*hochstpersönlich*) is unconvincing. If that argument did in truth set out a general principle of law, it ought to be equally valid in civil law, but that is far from being the case. On the contrary, delictual obligations of private individuals, which appear to present the same ' highly personal ' nature, normally pass to the heirs. That is not to say that the principles of private law are applicable as such in cases of State succession, but only that the one argument which is sometimes invoked against the transmission of delictual obligations is without force.

" The Tribunal is consequently of the opinion that unlike Claim No. 11, Claim No. 4, which, moreover, involves no discredit to Greece and the amount of which is easily ascertainable, must succeed."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*, p. 75).]

State Succession—With Regard to Concessions—Succession to Rights Under Concessionary Contract Subject to Assignment by Predecessor State of Share of Revenue—Treaty of Lausanne, 1923 —Keeping Alive of Turkish Loans—Effect on Lighthouses Concession—Interpretation of Treaties—Intention of the Parties—Preparatory Work.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Counterclaim No. 1.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *infra*, p. 659.) The Greek Government counterclaimed in respect of its share, under the concession, in the takings of Collas & Michel during the period 1913–1928.

Held: that the claim must fail. In 1904, 1907 and 1913, the Turkish Government had assigned its share of the lighthouse dues to creditors, in guarantee of certain loans. These loans were kept alive by the Treaty of Lausanne of 1923, which apportioned them between the Succession States, provided for their payment off in five years, but otherwise left their terms unaltered. When, therefore, Greece became grantor State of the lighthouses concession in succession to Turkey, her right to the latter's share in the proceeds of the concession was subject to the assignment in favour of Turkey's creditors. Collas & Michel had made payments out of the lighthouse dues to those creditors and, moreover, the advances had not by 1928 been entirely repaid. Nothing was therefore due to Greece in respect of the years in question.

The Tribunal said: "As the Tribunal has already suggested (towards the end of its examination of the French *Claim No.* 8[1]), this Greek claim must be approached in relation to the contracts for advances or loans concluded in 1904, 1907 and 1913 between the Ottoman Imperial Government of the one part and M. Pierre de Vauréal, Administrator-General of Lighthouses of the Ottoman Empire and a group of capitalists, represented by the same M. de Vauréal, of the other part. By the terms of these contracts—the Tribunal here refers to Article 1 of the contract of 1913—these advances were to be made 'on the express condition that by way of guarantee of the capital and of interest thereon, the [Ottoman] Minister of Finance will have given, previously and in writing, to M. P. de Vauréal, in both capacities (that is to say, in his dual capacity of Administrator-General of Lighthouses and of representative of the group of capitalists) a declaration by which, in the name of the Imperial Government, he assigns and alienates for the benefit of M. P. de Vauréal, in both capacities, without restriction

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[[1] See *infra*, at p. 809.]

or reserve, until complete and definitive payment, the whole of the normal royalties and revenues belonging or capable of eventually belonging to the State in the gross takings of the lighthouse dues under the terms of the Concessionary contracts dated August 8/20, 1860, June 30/12 July, 1879, October 13/25, 1894, and April 1/14, 1913, the operation of which has been determined and accepted until August 21/September 3, 1949 '. By Article 2 of the same contract ' the Imperial Government will hand to M. P. de Vauréal, in both capacities, the written undertaking of the Lighthouse Administration to pay into the hands of M. P. de Vauréal, in both capacities, throughout the duration of the concession, until its debt is duly discharged and completely extinguished, the total of all the revenues from the lighthouses belonging to the State.' This provision, as also, moreover, Article 8 (3), distinguishes in a manner which is not at all clear between M. de Vauréal in his two capacities and the ' Lighthouse Administration '—an appellation which in turn appears to be identical with ' Messieurs Collas and Michel the present concessionaires ' mentioned in Article 6.

" But, however that may be, it is the contracts for advances or loans which the Treaty of Lausanne, in Article 52, read in conjunction with Part B of the Table[1] annexed to section I of Part II (financial clauses) of the said Treaty (following Article 57), has particularly apportioned between Turkey and the Succession States mentioned in paragraph 6, among whom was included Greece. The principle of maintaining [the loans] in existence was so self-evident that the said Article 52 did not even consider it necessary to proclaim it in express terms along with the fixing of the bases of their apportionment which necessarily pre-supposed, moreover, the continuation of their legal existence. After the determination of the total of the part of those advances or loans which fell upon each of the interested States and the notification to the latter of that total, the sums charged against the States other than Turkey were to be paid by the said States to the Administrative Council of the Ottoman Public Dept and paid by the latter to the creditors or held to the credit of the Turkish Government until the sums paid by Turkey were duly discharged. The payments mentioned in this provision were to be made by means of five equal annuities calculated from the coming into force of the Peace Treaty. The part of the said payments which had to be paid to the creditors of the Ottoman Empire was to carry the interest laid down in the contracts for advances; the part which was to go to the Turkish Government would not carry interest.

" From these provisions, taken as a whole, it appears that the Treaty did not only maintain in force and apportion between

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[[1] Showing advances to be distributed between Turkey and the States mentioned in Article 46 of the Treaty under conditions laid down in Article 52, including three advances from the Lighthouses Administration.]

Turkey and the Succession States the debts created by the contracts concluded between the Ottoman Empire and M. P. de Vauréal, in his two capacities (part B of the Table mentions neither M. de Vauréal nor the group of capitalists, but only the Lighthouse Administration), but rather that it intended also to liquidate as soon as possible these advances, in providing for their repayment in five years, contrary to the provisions of the contracts.

" The keeping alive of the advances and the sharing of them between Turkey and the Succession States was in complete accord with the general principles of public international common law, which prescribed respect for vested rights (*droits patrimoniaux*) acquired on occasions of territorial changes. The sole doubtful question in this domain is whether a private vested right is included among these acquired rights. The Tribunal, nevertheless, does not hesitate to regard as such the rights flowing from a contract of loan, such as the contracts mentioned, entered into between a State and one or more private individuals.

" The general terms used by the draftsmen of Protocol XII annexed to the Treaty of Lausanne would appear to be inspired by the same kind of ideas when they declare Greece ' fully subrogated as regards the rights and obligations of Turkey towards the . . . beneficiaries under concessionary contracts ' whether they result from the contract itself or from associated operations. This conclusion is still further reinforced when one compares those terms with the equally general terms of Article 1 of the said Protocol, which maintains ' concessionary contracts and subsequent agreements relating thereto '; this Article, according to the Judgment of March 26, 1925, of the Permanent Court of International Justice in the case of the *Mavrommatis Concessions at Jerusalem*,[1] ' sanctions the fundamental principle of the maintenance of contracts and agreements duly entered into '.

" The contributions of Greece to the ' advances to the Lighthouse Company ' of 1904, 1907, and 1913, determined by the Council of the Ottoman Public Debt in its decision of November 6, 1924, and slightly modified as a result of the Arbitral Award of April 18, 1925, of M. Borel,[2] appears in official publications and in particular in the volume published in 1928 in Constantinople by the Council under the title of ' Tables relating to the distribution of the annual charges of the Ottoman Public Debt, drawn up in conformity with the financial clauses of the Treaty of Lausanne of July 24, 1923 and modified according to the awards of M. Borel, the arbitrator appointed by the Council of the League of Nations under Article 47 of the said Treaty ', especially in Table III (d), ' Greece ', Part B, at pages 28 and 29, that is, 10.55758527% in the advances of 1904 and 1907, and .54842367% in that of 1913. It was laid down in express terms that the currency in which these contributions are to be payable was the Turkish gold pound existing at the time when the various contracts were entered into.

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[1] *P.C.I.J.*, Series A, No. 5, p. 48 [*Annual Digest*, 1925–1926, Case No. 148].

[[2] *Ottoman Debt Arbitration*: *ibid.*, Cases No. 57 etc.]

" That solution was perfectly in harmony with the intention of the contracting Powers at Lausanne. ' From their deliberations ', says the Arbitrator, ' it results that in so acting '—that is, in excluding the idea of determining in the Treaty the currency in which the loans were to be repaid—' the High Contracting Parties intended to leave completely intact the respective rights of the bondholders of the Debt and of the debtor States.'[1] Now, to borrow the terms used by General Pellé at the session of the Third Committee of the Peace Conference of Lausanne on Monday, May 7, 1923:

> ' The Allied Delegations have insisted strongly on the point that in law and in fact the Peace Treaty cannot in any way modify existing private contracts between the Turkish State and its creditors ' (see *Recueil des Actes de la Conférence,* Second Series, vol. 1, pp. 297–298).

Contracts of advance ought, in consequence, to be regarded as having been in no way affected by the Treaty of Lausanne, except in so far as Article 52 of that Treaty introduced specific modifications. For all the rest, the contracts continue to be governed by their own law and there is no good reason to except from that principle the special clauses protecting the legitimate rights of the lenders, such as that by which they are given an essential guarantee of the repayment of their capital and interest in the form of an assignment of the part belonging to the borrower State, in its capacity of grantor State, in the lighthouse dues to be collected by a third party, the concessionaire firm. The only modifications introduced on this topic in the service of these loans concerned the acceleration of the redemption mentioned above and a change in the mode of payment, both of which modifications operated in the interests of the lenders. The regrettable fact that this new mode of repayment, through the intermediary of the Council of the Ottoman Public Debt, was never followed by Greece—a fact which, however, led the Council of the Apportioned Public Debt of the former Ottoman Empire, after interminable tergiversations on the part of Greece, to condemn her attitude in very severe terms (see Report on the ninth exercise, June 1, 1937–May 31, 1938, p. 46)—cannot, of course, affect in any way the substantial rights acquired by the lenders nor the actual guarantees of repayment to them provided for in the contracts of advance. Default on the part of a Succession State in fulfilling its obligations under Article 52 of the Treaty of Lausanne, for whatsoever reason, would have had no other effect than to maintain the pre-existing rights and obligations in their original force. That is the aspect from which the Administrative Council of the Ottoman Public Debt evidently viewed the situation.

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[1] *Recueil des Sentences Arbitrales,* vol. 1, p. 550.

In the lists of arrears of these loans which appear in the tables published by the Administrative Council, the latter continued to calculate them as laid down in the original contracts, without taking into account the reduction to five years of the term originally provided for the complete liquidation required by Article 52.

"In any event, when Greece, in her capacity as successor State to all the rights and obligations of Turkey in respect of the beneficiaries of the concessionary contracts under Protocol XII of the Treaty of Lausanne, now claims from the firm of Collas & Michel, her concessionaire, the payment to herself of the proportionate part of the receipts to which she would be entitled in such capacity, she is claiming something which is not due to her. Indeed, in her other capacity of Successor State, by virtue of Article 52 of the Treaty of Lausanne, to a proportionate part of the three contracts of loan concluded by the former Ottoman Empire, she remained similarly bound by the provisions therein which guaranteed to the lenders repayments of capital and payment of interest by means of an irrevocable assignment to the lenders of a proportionate part of the receipts until the total and definitive repayment of the advances. This assignment involves for the latter [*sic.*] the obligation not to pay the debt to any other person.

"It would be otherwise only if Greece had conformed to the new accelerated method of liquidating the advances laid down in the Treaty of Lausanne, through the Administrative Council of the Ottoman Debt or if it appeared to the satisfaction of the Tribunal from documents laid before it that the firm had already, before 1929, repaid to M. de Vauréal, in his two capacities, the whole of the moneys still owing to the group of capitalists.

"As regards these last points, the Tribunal by its Procedural Order No. 6 required the agents of the parties to supply certain detailed information. From this information, supplemented by the replies given to certain questions put by the Tribunal to the French agent at the third public session of June 29, 1956, it appears clearly that, on the one hand, no payment was ever made by Greece in compliance with its obligations under Article 52 of the Treaty of Lausanne and, on the other hand, the firm continued to pay to the group of creditors the sums falling due to them . . . and that by 1929, the whole of the advances had not yet been completely repaid.

"However, it appears from the documents produced by the French Agent that the firm between 1913 and 1925 postponed their payments, which were combined into one single payment in May 1925. It results therefrom that, during that period, the firm received dues in an appreciated currency which became gradually devalued, while the payments were made in a depreciated currency.

"Greece's debt to the lenders, which would have been mainly and perhaps completely liquidated if the payments had been paid monthly in accordance with the terms of the contract, has thus been repaid only to a very small extent. The quite recent date to which the Tribunal was able to obtain a definite confirmation of this position explains how the present award cannot decide on the consequences involved in the fact mentioned above and on which the Tribunal reserves its decision until the last.[1]

" In these conditions, Greece cannot legitimately claim to receive from Collas & Michel payment of the part of the receipts belonging to the grantor State which accumulated in the past. She must in consequence be nonsuited in regard to her demand, drawn up under the head of Counterclaim No. 1, to obtain 7/16ths or 50% of the total of the lighthouse dues received by the firm during the period 1913 to 1928.

" This conclusion applies equally, *mutatis mutandis*, to the Greek counterclaims examined above, together with French Claims No. 8,[2] 7[3] and 9[4] . . . which relate respectively to the seizure of the takings of the firm at Salonika, at Tenedos and at Dedeagatch. In those cases, it is true, there was no question of Greek demands for payment of a part of the receipts collected by Collas & Michel in the past, but, on the contrary, demands by the firm for restitution of takings seized by Greece in the past. The Tribunal cannot, all the same, admit, in the cases of Salonika, of Tenedos and of Dedeagatch, any more than in the case of Counterclaim No. 1, that Greece could legitimately claim the parts of the takings regularly assigned to third parties. That is why the Tribunal has rejected the Greek counterclaims linked with French claims Nos. 8, 7 and 9."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 121.]

State Succession—With Regard to Concessions—Seizure by Successor State of Lighthouses Subject of Concession Granted by Predecessor State—Claim for Operating Costs—Assessment of Claim—Relevance of Amount Actually Spent.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Counterclaims No. 3–6.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *infra*, p. 659.) These four counterclaims, which were dealt with together because they were governed by the same principles, related to the costs which the Greek Government incurred in connection with the operation of the lighthouses after taking possession of them in May 1915: the cost of their working (No. 3);

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[1] [See *infra*, p. 674.]

[2] [See *infra*, p. 806, and *supra*, p. 79.]

[3] [Not reported in *International Law Reports*.]

[4] [Not reported in *International Law Reports*.]

the cost of transporting stores to the lighthouse (No. 4); the pay of the staff (No. 5); and the expenses of repair and maintenance (No. 6).

The counterclaims cover the period from May 1915 to January 1, 1929, on which date Collas & Michel were ousted from the collection of dues. During that period the firm continued to collect the dues, which remained in their hands. On the other hand, they did not have to expend anything for the operation of the lighthouses during the whole period from 1915 to 1929.

Held: that the claims must succeed to the extent that Collas & Michel had been relieved of the cost of operating the lighthouses over the period in question. That amount did not necessarily correspond with the amount expended by Greece, and would have to be assessed after a professional appraisement.

The Tribunal said: " It is . . . reasonable that the firm should restore to the grantor Government the cost of operation which they did not have themselves to bear for more than thirteen years. That restitution could not, however, be ordered on the basis of what was actually expended by Greece. It should rather be related to the costs which the firm would have had to bear if the Greek Government had not ousted them from the operation of the lighthouses in breach of the provisions of the concessionary contract.

" The Greek Agent having submitted to the Tribunal accounts indicating the sums laid out by Greece for the four classes of expenditure under Nos. 3 to 6, but the French Agent having contested the utility or the necessity of certain of these expenses, the Tribunal by its Procedural Order No. 4 required the French Agent to submit to it more detailed observations on the Greek figures, the Greek Agent to be allowed subsequently to present counter-observations thereon. The result of this exchange was that Collas & Michel, for their part, put forward detailed objections to the Greek figures on the basis that they themselves, as a private enterprise, would certainly not have spent the larger amounts appearing in the Greek accounts, which were typical of the operation of a public service by the State itself—an observation which corresponds exactly with common experience. The Greek Agent, on the contrary, confined himself to replying to these general observations and to the detailed criticisms by the firm, that Greece actually spent the amounts indicated—an assertion of which neither France nor the Tribunal had contested the truth but which is not of a kind which would assist the Tribunal greatly in its task of fixing a reasonable amount for the various items of expenditure mentioned in Counterclaims No. 3 to 6. [The Tribunal here reviewed and rejected certain financial details which had been placed before it.]

" In default of other information capable of furnishing an exact assessment, the Tribunal finds itself obliged to have recourse to a professional appraisement in order to determine the annual sums which the firm would normally have had to expend between May 1, 1915, and December 31, 1928, for the maintenance and the operation of the lighthouses in the zone of New Greece, that is to say, the cost which the firm would have had to bear over and above those which it effectively continued to bear after the seizure by Greece of the lighthouses.

" These costs are to be determined in drachmae, at the average value of the drachma for each of the years in question, that being the currency in which the economic results of the concession on the Greek territories, and more particularly the dues collected, will be assessed by the Tribunal."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 130.]

State Succession—Succession to Obligations—Respect for Private Rights—"Act of State"—Whether Available against Citizens—Former Indian States—Merger with Dominion (Union) of India—Change of Sovereignty—Impact on Private Rights—The Republican Constitution of India.

GAJJAN SINGH *v.* UNION OF INDIA AND OTHERS.

India, Judicial Commissioner's Court of Himachal Pradesh.

(Ramabhadran J.C.)

November 11, 1955.

THE FACTS.—The plaintiff and one of the defendants, the former Ruler of the Baghat State, had prior to the independence of India concluded certain transactions and had mutual claims originating from them. It was agreed between the plaintiff and the Ruler that they should render accounts to each other and settle them. After independence, the administration of the State of Baghat was transferred to the State of Himachal Pradesh and that State became, in 1948, part of the Dominion (Union) of India. The plaintiff, in order to obtain the payment of his claims, instituted two suits against the Union of India as the successor to the Ruler of Baghat. The two further defendants in the case were the State of Himachal Pradesh and the Ruler. The actions were considered by a District Judge, who dismissed them, and the case came on appeal before the Judicial Commissioner of Himachal Pradesh. The contention of the defendants was, *inter alia*, that the Union of India and the State of Himachal Pradesh could not be sued in a municipal court in respect of a claim relating to the former Baghat State and that neither the District Judge nor the Court of Appeal could take cognizance of the suits as they were barred by an Act of State. The appellant (plaintiff) argued that no cession or annexation of territory had taken place when the Baghat State was taken over by the Union of India.

Moreover, sovereignty (it was maintained) was abandoned by the Dominion of India and by the States and surrendered to the Constituent Assembly, which passed the new Republican Constitution according to which all were citizens in a new order. The plaintiff as well as the Ruler became subjects of independent India from the very beginning and thus " there can be no Act of State against the citizen ".

Held: that the Court was not debarred from taking cognizance of suits arising out of obligations of Rulers of former Indian States and that on that ground the appeal would be allowed. The plaintiff was an Indian citizen, and according to well-established legal principles the defence of Act of State could not be pleaded by a Government against its own subject. It would have been possible to do so if the former State of Baghat had been annexed by, or ceded to, independent India. This, however, was not the case.

The Court said: " In deciding this issue against the plaintiff the Court below has not referred to any law or enactment. It has based its findings on certain decisions of the Privy Council, *i.e.*, *Secretary of State for India* v. *Bai Rajbai*, AIR 1915 P.C. 59, *Nayak Vajesingji Joravarsingji* v. *Secy. of State*, AIR 1924 P.C. 216, and *Asrar Ahmed* v. *Durgah Committee Ajmer*, AIR 1947 P.C. 1.[1]

" In AIR 1915 P.C. 59 their Lordships were considering the rights of certain Kasbatis in village Charodi, pargana Viramgam, district Ahmedabad in the Province of Gujerat. This village was formerly within the territory of His Highness the Gaekwar of Baroda. It was, however, ceded to the British Government in 1817 with the concurrence of the Peshwa. Before the transfer of the territory to the British Government the Kasbatis were invested with certain powers over the village, including the management of village affairs. Under those circumstances, their Lordships observed that:

> ' Where a territory is ceded by a native sovereign to the British Government the relation in which the landholders in that territory stood to their native sovereigns before the cession, and the legal rights they enjoyed under them, are entirely irrelevant matters.—They could not carry in, under the new régime, the legal rights, if any, which they might have enjoyed under the old. The only legally enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied or by legislation, chose to confer upon them.'

" In AIR 1924 P.C. 216 their Lordships were dealing with the question of certain lands situated in Panch Mahals, which prior to 12.12.1860 were in the domain of the Sindia of Gwalior. On that date, the territory was ceded to the British Government by treaty.

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[1] See *Annual Digest*, 1946, Case No. 17.]

Following AIR 1915 P.C. 59 referred to earlier, their Lordships held that:

'When a territory is acquired by a sovereign State for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory, hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the Municipal Courts established by the new sovereign, such rights as that sovereign has, through his officers, recognized.—Such rights, as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the Municipal Courts. The right to enforce remains only with the High Contracting Parties.'

"AIR 1947 P.C. 1. There, their Lordships were considering the question of the hereditary nature of the office of Mutawalli in the shrine of Durgah Khawaja Sahib at Ajmer. The plaintiff, Asrar Ahmed, relied upon a Firman issued by a Moghul Emperor, Mohammad Shah, and two Sanads granted by Daulat Rao Sindia. All these documents were issued before the province of Ajmer was ceded to the British Government. Following AIR 1915 P.C. 59 and AIR 1924 P.C. 216, their Lordships reiterated that:

'Where a state has been ceded by a Native Ruler to the British Government the rights which the inhabitants of that state enjoyed against its former ruler avail them nothing against the British Government and cannot be asserted in the Courts established by that Government except so far as they have been recognized by the new Sovereign Power. Such recognition may be by legislation or by agreement, expressed or implied.'

"The appellant urged that the rulings, relied upon by the learned District Judge, are not applicable to the facts of the present case. He elaborated his argument by making reference to the Preamble of the present Constitution of India, which shows the resolution of the people of India to constitute a Sovereign Democracy in India and, accordingly, with a view to secure justice, liberty, equality and fraternity [they] gave to themselves the present Constitution.

"[The appellant] urged that there could be no comparison between the merger of Baghat State into the Union of India with the conquest of certain parts of India by the British Government, or the cession of certain territories to it. My attention was also invited to the form of the agreement, signed by Himachal Pradesh Rulers, contained in Appendix XXVII of the White Paper on Indian States issued by the Government of India, Ministry of States, on 5.7.1948. A perusal of that agreement shows that the Ruler of the State concerned felt that it would be in the best interest of the State and its people that the Central Government should take over the administration of the State and integrate its territories with the territories of the East Punjab Hill States so as to make one administrative Unit. Article 1 of the agreement transfers to the Dominion Government full and exclusive authority, jurisdiction and powers in relation to the governance of the State, Article 2 provides for the Privy Purse of the Ruler. Articles 3 and 4 provide for the enjoyment of the Ruler's private properties and his personal privileges, while Article 5 guarantees the succession to the ' gadi ' of the State.

" There is nothing in the agreement to suggest that there was to be a break in the continuity of the administration or in the rule of law. Under paragraph 5 of the Himachal Pradesh (Administration) Order, 1948, all laws in force in Himachal Pradesh or any part thereof before the commencement of the Order were to continue in force until repealed or amended by a competent authority. It was not a case of a cession or annexation as is referred to in the three Privy Council decisions discussed earlier. [The appellant] supported his argument by reference to *Virendra Singh* v. *State of U.P.* AIR 1954 S.C. 447,[1] wherein their Lordships of the Supreme Court observed as follows:

> ' From the attitude of the Dominion of India towards the States which it sought to draw into the Republic of India, which was yet to be free, sovereign, democratic, in inviting the Rulers of the States and their people to join the Constituent Assembly and take part in its deliberations and labours as citizens of India, inspired by common allegiance to the motherland and the acceptance of the invitation by the Rulers it was impossible to think of those who sat down together in the Constituent Assembly, and of those who sent representatives there, as conqueror and conquered, as those who ceded and as those who absorbed, as sovereigns or their plenipotentiaries, contracting alliances and entering into treaties as high contracting parties to an Act of State.
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> ' They were not there as sovereign and subject, as citizen and alien, but as the sovereign peoples of India, free democratic equals, forging the pattern of a new life for the common weal. Every vestige of sovereignty was abandoned by the Dominion of India and by the States and surrendered to the peoples of the land who through their representatives in the Constituent Assembly, hammered out for themselves a new Constitution in which all were citizens in a new order having but one tie, and owing but one allegiance, devotion, loyalty, fidelity, to the Sovereign Democratic Republic that is India.
>
> ' At one stroke all other territorial allegiances were wiped out and the past was obliterated except where expressly preserved, at one moment of time the new order was born with its new allegiance springing from the same source for all, grounded on the same basis: the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction, no reservation.
>
> ' It is impossible for a sovereign to exercise an Act of State against

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[[1] See *International Law Reports*, 1955, p. 131.]

his own subjects. However disputable the proposition may be that an Act of State can be exercised against a citizen who was once an alien, the right being only in abeyance till exercised, there has never been any doubt that it can never be exercised against one who has always been a citizen from the beginning in territory which has from its inception belonged to the State seeking to exercise the right.

' The new Republic was born on 26.1.1950 and all derived their rights of citizenship from the same source and from the same moment of time; so also at the same instant and for the same reason all territory within its boundaries became the territory of India . . . . '

" The three Privy Council decisions referred to deal with Acts of State. The Supreme Court judgment referred to above makes it clear that there can be no Act of State against a citizen. Consequently, it would not be open to the defendants to contend that the suits are barred by an Act of State. The appellant cited *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*, AIR 1931 P.C. 248, where in a case from Nigeria their Lordships of the Privy Council, with reference to the expression ' Act of State ', remarked as follows:

' The term " Act of State " as applied to an Act of the Sovereign Power directed against another Sovereign Power or the subjects of another Sovereign Power, not owing temporary allegiance in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, may give rise to no legal remedy; but as applied to acts of the Executive directed to subjects within the territorial jurisdiction it has no special meaning and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act.'

" In view of all that has been said above I am unable to support the view of the Court below that it was debarred from taking cognizance of these suits." The appeal was dismissed on other grounds.

[Report: A.I.R., 1956, H.P. 9.]

State Succession—Succession with Regard to Contractual and Other Obligations—On Cession by Treaty—Cession by France of Chandernagore to India.

See p. 106 (*Lighthouses Arbitration between France and Greece—Claim No. 12a*).

State Succession—Succession with Regard to Contractual and Other Obligations—Treaty Provision Anticipating Possible Cession of Territory.

See p. 106 (*Lighthouses Arbitration between France and Greece—Claim No. 12a*).

State Succession—Succession to Obligations—Two Successive Succession States—Effective Date of Subrogation—Relevance of Dates of Coming into Force of Peace Treaties.

See p. 632 (*Lighthouses Arbitration between France and Greece—Counterclaim to Claim No.* 4).

State Succession—Succession with Regard to Contractual Obligations—Debts of Wartime Puppet State—Debts of Independent State of Croatia—Refusal by Yugoslavia to Pay.

See p. 591 (*Re Dues for Reply Coupons Issued in Croatia; Re Transit Charge for Mails from Occupied Yugoslavia*).

State Succession—Succession to Obligations—Loan Issued in France by Independent Congo—Subsequent Change of Status of Congo to Belgian Congo—Whether Belgian Congo Subject to Jurisdiction of French Courts.

See p. 191 (*The Belgian Congo* v. *Montefiore*).

IV.—Succession with Regard to Obligations for Delinquencies (Torts)

State Succession—Succession with Regard to Obligations for Torts—Duty to Pay Compensation—Effect of Provisions of Treaty of Peace—Coming into Force of Treaty as Critical Date—Greece as Successor State of Turkey—Treaty of Lausanne, 1923.

Lighthouses Arbitration between France and Greece.
Claim No. 12*a*.

Permanent Court of Arbitration. July 24, 1956.
(Verzijl, President; Mestre, Charbouns.)

The Facts.—(See *infra*, p. 659.) During the autumn of 1911, the Turkish Commandant of Kara-Bournou, without consulting Collas & Michel, removed a buoy which was on a bank of the Vardar at the entry to the port of Salonika. Collas & Michel, alleging that the military authorities of Kara-Bournou had carried out this operation without taking precautions, claimed compensation on that ground against the head of the Ottoman Admiralty as early as October 1911. That Admiralty appears to have admitted its responsibility in a letter dated July 30, 1912, addressed to Collas & Michel, but the discharge of the debt seems to have remained in suspense after the Balkan Wars. Collas & Michel now claimed against the

Greek Government damages amounting to some 250 U.S. dollars. They relied on the principle of State succession, independently of the formal subrogation of Greece, under Protocol XII of the Treaty of Lausanne, to the dues and charges payable to the Ottoman Empire from the lighthouse concession and invoked in support certain international precedents, including the conditions of cession of the French free territory of Chandernagore to India (Article 7 of the Treaty of February 2, 1951) and the Exchange of Notes of January 2, 1930, between the American and British Governments relating to the Sulu Islands, which form an integral part of the Philippine archipelago and are situate to the south-east of Mindanao.

Held: that the claim must fail. The instances cited were not relevant. The removal of the buoy was a legitimate act of the Ottoman Admiralty subject to the duty to pay compensation, but that duty did not devolve on Greece as successor State to Turkey.

The Tribunal said: " The former case concerns the succession of India to the rights and obligations resulting from acts performed by France in respect of matters of public interest and relative to the administration of the territory of the Free Town of Chandernagore. It is understandable that in such a case of gratuitous and *ex gratia* concession of a territory to another State, the ceding State would be anxious to be free from the obligations which may still rest upon it under the heads of construction works, improvements, repairs and other things undertaken for public objects which will in future profit only the State to whom the territory is ceded.

" In the latter case, there was a specific treaty stipulation guaranteeing to the British North Borneo Company, in the event of the Island of Taganak—one of the Sulus—being the object of a subsequent transfer of sovereignty (by the United States):

" (*a*) Compensation by the United States for the monies expended by the Company in the past for the upkeep of the lighthouse on that island, and

" (*b*) maintenance of the lighthouse after such a transfer.

" In this special and rather complicated case, there is an overlapping of interests, territorial sovereignty over the island belonging to the United States but the interests of navigation [on the coast of] North Borneo requiring the upkeep of a lighthouse for the sole benefit of the British North Borneo Company.

" There is, it is true, a certain affinity between the two precedents cited and the case of the Vardar buoy of 1911/1912, but their application to the latter case is minimal seeing that in the two more recent cases there existed quite special situations, regulated by particular treaty stipulations, from which it is not permissible to draw conclusions in favour of the existence of a general principle of common law which ought to regulate similarly other situations depending upon an appropriate conventional solution.

" In the present case, the removal of the buoy by the Ottoman Admiralty was evidently a normal measure of national security, taken in anticipation of imminent hostilities between the Balkan Allies and the Ottoman Empire. As such, it was perfectly legitimate, subject to the duty of the Ottoman Treasury to compensate the owner of the buoy. The question whether or not there was, in this case, any obligation on Turkey to pay compensation depended on the clause of the concession, in the light of international common law. Even supposing that the said obligation were beyond doubt, it was among the ' rights and obligations towards . . . companies in which the capital of the nationals of the [other Contracting Powers] is preponderant' mentioned in Article 9 of Protocol XII of the Treaty of Peace of Lausanne of July 24, 1923. Now, the subrogation of the successor States in respect of such charges stipulated for territories detached from Turkey under the said Treaty of Peace would not have effect, according to the said Article 9, until the coming into force of the Treaty by which the transfer of the territory was stipulated. From the purely grammatical point of view, it would be possible to interpret this situation as comporting an obligation for the successor State—in this case Greece—to take over, from the date mentioned in the said Article 9, all the rights and obligations of Turkey towards the firm of Collas & Michel, even those which had their origin in happenings prior to that date; but it is surely not in that sense that the provision in question can be interpreted. The critical date evidently serves as the termination of Turkish responsibility and the commencement of Greek responsibility in the sense that everything which happened before the critical date and which can have given rise to charges against the concessionary firm continues to involve the responsibility of the Turkish State. One can only admit that within the scope of this conventional sharing of responsibilities according to time, some other autonomous and complementary principle, borrowed from the general doctrines of State succession, may be invoked to upset the juridical effects of the said sharing of responsibilities according to the Protocol. Greece cannot, therefore, be held responsible for the damage caused by the taking of the buoy at Vardar in 1911 by the Ottoman naval authorities."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*, p. 73.]

V.—Respect for Private Rights

State Succession—Respect for Private Rights—Continuance of Contractual Obligations—Leases—Merger of Indian States.

INDUMATI *v.* STATE OF SAURASHTRA.

India, High Court of Saurashtra. February 7, 1955.

(Shah C.J. and Baxi J.)

THE FACTS.—The petitioner received from the Talukdar (Ruler) of Vithalgadh, before the independence of India, a lease of a village for a period of ninety-nine years. After independence, when the territory of Vithalgadh was merged with the newly-formed State of Saurashtra within the Dominion (Union) of India, the village was made over to the State. In 1949 the Head of the State (Rajpramukh) passed the Saurashtra Grants (Resumption) Ordinance, which empowered the Government to cancel certain grants in the public interest. Lands comprised in such grants were deemed to vest in, and to belong to, the Government. The lease of the petitioner was cancelled under the Ordinance. She thereupon filed a petition challenging the Government Order on the ground, *inter alia*, that it was in contravention of Clause 6 of the Covenant whereby the State of Saurashtra as successor to the convenanting Rulers (including the lessor) had undertaken to discharge their obligations. The petitioner also contended that the Government Order was not made in the public interest.

Held: that the petition must be dismissed. Though the successor State (in accordance with the provisions of the Covenant) was bound to respect the contractual obligations of the predecessor (the covenanting Ruler) and could not terminate its obligations by an *executive* order, the *legislative* authority of the successor State was free to pass a law releasing the State from the obligation contracted by the predecessor.

The Court said: " It was . . . argued on behalf of the petitioner that the order of resumption was in contravention of Article 6 of the Covenant. By Article 6 the Saurashtra State took over all liabilities of the covenanting Rulers and undertook to discharge the same. It is argued that the Vithalgadh Talukdar was under an obligation to respect the lease and allow the petitioner to enjoy the village for the period of 99 years provided by the lease.

" Therefore the Saurashtra State was bound under Article 6 of the Covenant to respect that obligation, and the order of resumption was consequently void and of no effect. The obligation to respect the lease for the prescribed period, which the Saurashtra State undertook to discharge, arises out of the contract contained in the lease. It was the contractual obligation of the State, and the State could not terminate that obligation by an executive order.

"But the State's sovereign legislative authority is not in any way curtailed by that obligation and it is open to the State to pass a law terminating the lease and releasing the State from its contractual obligation. This principle has been affirmed by this Court in *Dhrangadhra Chemical Works Ltd.* v. *State of Saurashtra* (8 Sau. L.R. 157) . . ."

The petitioner also contended that the cancellation of the lease was not made in the public interest. To this the Court replied: "It was certainly in the public interest to prevent the Rulers from frittering away the State lands on the eve of the disappearance of their States and converting them into private property by the expedient of making grants in favour of their relations."

[Report: A.I.R. 1956 Saurashtra 32.]

NOTE.—As to the distinction between termination of contractual obligations of the predecessor State by executive Order and by legislative authority, see *Maharaj Umeg Singh* v. *State of Bombay* (A.I.R. 1955 S.C. 540; *International Law Reports*, 1955, p. 138).

State Succession—Effect on Private Rights—Change of Sovereignty—Annexation—Succession of East India Company to Indian Princely States—Title to Land.

BAPU AND BAPU *v.* CENTRAL PROVINCES.

India, High Court of Nagpur. April 7, 1955.
(Sen and Deo JJ.)

THE FACTS.—This was an appeal from an order of the District Court of Bhandara giving the Central Provinces possession of certain land at Bhandara, which the District Court found to be part of the Public Works Department road known as the Great North Road. The history of the land was traced back to the time of the succession to the Princely State of Nagpur of the East India Company and subsequently the British Government. On the question whether the predecessors of the defendants (the present appellants) had a good title to the land, the Court considered whether and to what extent changes of sovereignty in the territory of the Central Provinces in which the land was situated had affected the private rights of defendants or their predecessors.

Held: that the appeal must fail. Although changes of sovereignty did not normally affect private rights in property, when territory previously in the occupation and under the rule of an Indian State passed to the British Government, all rights which the State had in the land came to an end and thenceforth the grant of the British

Government alone formed the root of the title. The appellants could show no such grant of the land in dispute.

The Court said: "The Nagpur territory, which included the present Bhandara district, was under the management of the East India Company from about 1818 on behalf of the then Bhonsla Ruler. On the death of Rabhoji III, without any issue, this Kingdom was annexed by the East India Company as a sovereign ruler by an order dated 14th June 1854. In the proposals made in the same year for the future administration of the territory, the Chief Commissioner had pointed out that a metalled road from Ahmednagar to Cuttack through Raipur and Nagpur would connect the two sides of the peninsula and would form the basis for branch roads connecting the northern and southern parts of the country. It was pointed out that this trunk road was necessary for the development of trade and should be metalled. As regards the settlement of lands, it was suggested that the principle of private property should be adopted in place of periodical leases of villages for two to five years given during the Bhonsla régime. The proprietary rights of the then lessees were not recognized until 1860 and the assessment of 'theka' was made at so much per acre of cultivated land.

"It is no doubt true that there is every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property: *vide West Rand Gold Mining Co.* v. *The King* (1905) 2 K.B. 391 relied on in *Masjid Shahid Ganj* v. *Shiromani Gurdwara Parbandhak Committee Amritzar* (A.I.R. 1940 P.C. 116). There is, however, no evidence that the title to the disputed area rested with any private person at the date when the sovereignty of the Nagpur territory passed to the East India Company in 1854. It was open to the East India Company on the ground of conquest or otherwise to annul rights of private property. Bhonslas did not recognize the rights of private property to village lands. At any rate, there is no such evidence.

"The only legally enforceable rights which any claimant would have against the East India Company or against the British Government were those and those only which the Company or the Government by agreement express or implied, or by legislation, chose to confer upon them: *Secretary of State* v. *Bai Rajbai* (A.I.R. 1915 P.C. 59) and *Madura Tirupparan Kundaram, etc. Devasthanams* v. *Ali Khan Sahib* (A.I.R. 1931 P.C. 212). In *Lalchand* v. *Dharnoo* (A.I.R. 1938 Nag. 95) it was held that when territory previously in the occupation and under the rule of an Indian State passed to the British Government, all rights which the previous Government had in the land determine. In every case the grant of the British Government alone formed the root of title. See also *Ramachandra* v. *Ratanlal* (A.I.R. 1944 Nag. 280)."

[Report: A.I.R. 1956 Nagpur 59.]

VII.—International Conventions

State Succession—Treaties—Extinction of State—Subsequent Reconstitution—Incorporation of Austria into German Reich—Re-Acquisition of Independence by Austria—Whether Treaties between Austria and Germany Concluded Prior to Incorporation of Austria Revived After Re-Acquisition of Austrian Independence.

See p. 123 (*Double Taxation Agreement* (*Austria*) *Case*).

IX.—Continuity of the Law. Judgments of Courts. Pending Actions

State Succession—Continuity of the Law—Public Law—Continuation of Income Tax Laws and Assessments—Partition of India—Effect on Assessment for Income Tax in Former British India.

Kumar Jagadish Chandra Sinha *v.* Commissioner of Income Tax.

India, High Court of Calcutta. September 2, 1955.

(Chakravarti C.J. and Lahiri J.)

The Facts.—The applicant, who was resident in India, owned an estate (Zemindari) in the district of Jessore which as a result of the partition of India went to Pakistan with effect from August 15, 1947. In the accounting year 1947/1948, the applicant received from his Zemindari an income of Rupees 185.380. [In the words of the report:] " This money was rent derived from land used for agricultural purposes, but it was income of a period during a part of which the land belonged to undivided India and during the remaining part . . . to Pakistan. There was nothing to show how much of the amount had been received up to August 14, 1947, the date immediately preceding the date of the partition, and how much from August 15, 1947, up to the end of the accounting year. By applying the rule of three on the time basis, the income tax authorities determined the pre-partition income at Rupees 61.793 and the post-partition income at Rupees 123.546. The former sum was Indian income and also agricultural income as defined in the Indian Income Tax Act and therefore it was excluded from the assessment. With regard to the latter sum, the assessee's contention was that that sum also was agricultural income and therefore exempt from taxation . . . The Income Tax authorities rejected that contention and gave reasons in the broad form that the amount received after August 15, 1947, from land then situated in Pakistan did not satisfy the definition of agricultural income as contained in S. 2 (1) (a) of the Income Tax Act and therefore it was liable to be included in the assessment. At the request of the assessee a reference was made to the High Court as follows: Whether the portion of the assessee's income which accrued or arose to him on and after August 15, 1947, from agricultural lands situate in Pakistan and which had been assessed to land revenue in pre-partition British India is exempt from Indian income tax in the assessment year 1948/9."

Held: that in the case of the assessee's Zemindari in Jessore it was necessary to know whether its assessment to land revenue as made in British India was subsisting or whether Pakistan had released it from assessment or made an assessment of its own. What the position in that regard was was not known, because the law of Pakistan was not proved. Hence, strictly speaking, the present question could not be answered. . . . However, on the construction of the definition of agricultural income in S. 2 (1) (a), as adapted by the Order of 1947, the Court considered that the said portion of the assessee's income was not exempt from the Indian Income Tax Act.

The Court said: " The land if it goes over to a foreign State (Pakistan) will obviously cease to be land which is assessed to land revenue in British India if the original assessment is cancelled by the foreign State or is replaced by an assessment made by that State on its own account. It cannot surely be contended that if only the land was assessed to land revenue in British India at some time, it will continue to be land which is assessed to land revenue in British India, even if the land is allotted to a foreign State and the assessment which was made in British India is abrogated altogether or the foreign State makes an assessment of its own.

" The applicant did not agree with this view but I (C.J.) am unable to see where one would find an assessment to land revenue in British India as an attribute of the land if the assessment made in British India disappeared. The applicant said it could not disappear. He could not have meant that even if some land which originally belonged to what was British India came to be allotted to another State, that State would have no power to repeal an assessment made in British India and either leave the land unassessed or make a fresh assessment for itself. ' He must have meant that although the assessment itself could be abrogated, the act of assessment or the fact that an assessment had taken place in British India, which according to him, was sufficient to make the income agricultural income, could not be wiped out. But the Section says ' is assessed ' and not ' was assessed ' or ' is or was assessed '.

" In my opinion even if the words ' is assessed ' referred to the act of assessment, the continuance of such assessment is essential and therefore if the income derived from the land concerned is to be treated as agricultural income on the basis of its assessment to land revenue in British India, it cannot be held to be such income on such basis after the assessment has ceased to exist.

" In the case of the assessee's Zemindari in Jessore, it is thus necessary to know whether its assessment to land revenue, as made in British India, is subsisting or whether Pakistan has released it from assessment or made an assessment of its own. What the position in that respect is is not known because the law of Pakistan was not proved." In the absence of such proof the Court was not prepared to presume that on change of sovereignty after the partition of India the income tax law and practice formerly observed and applied in British India had continued unchanged.

[Report: A.I.R., 1945, Calcutta 48.]

G—MISCELLANEOUS

Holy See—Position of—Lateran Treaty of February 11, 1929—Interpretation of—Italian Jurisdiction in Respect of Crimes Committed in the Vatican City—The Law of Italy.

Re SORRENTINO.

Italy, Court of Cassation (United Chambers). May 1, 1955.

THE FACTS.—The appellant was convicted by an Italian Court of the offence of larceny committed in the Basilica of St. Peter. He contended that the Italian courts had no jurisdiction over the offence because it had not been committed in Italian territory and his arrest had been carried out by an officer of the Italian State police in the Vatican City, without a prior request by the papal authorities.

Held: that the appeal must be dismissed. The Italian courts were entitled to exercise jurisdiction over the appellant, and there was no need to determine the question whether a request by the papal authorities for the arrest of a person in the Vatican City was required because the Italian courts were in any event entitled to exercise jurisdiction over any person in Italian territory even if his removal to that territory was the result of action taken by the Italian State police in the Vatican City.

The Court said: " The report of April 22, 1950, shows that an officer of the State police, one P., was present at a public audience of the Pope in the Basilica of St. Peter in Rome held on that day. He was there to give police support in accordance with a request of the competent authority. The appellant, who is stated to have committed the offence of larceny against a person unknown, was arrested by P. and another police officer in the Basilica of St. Peter.

The two police officers were present as reinforcements to assist the papal police. There is no need to enquire whether under the first part of Article 22 of the Treaty between the Holy See and Italy there was a request of, or delegation by, the Holy See because, in so far as concerns the legality of the appellant's arrest and the criminal proceedings instituted by the Italian judicial authorities, the condition of the second part of Article 22 was satisfied, namely, that the accused was in Italian territory, even if only as a result of the arrest carried out by the two police officers who acted as reinforcements of the papal police. This is in accordance with the jurisprudence of this Court, as shown, *inter alia*, in the judgment of May 10, 1952, in *Re Azzoli and Others*[1], where it was held that the words ' having taken refuge in the territory of the State of Italy ' are equivalent to the words in the Italian Penal Code ' the accused being in the territory of the State for any reason whatsoever . . .' The third ground of appeal is unfounded, namely, that the Zanardelli Penal Code should have applied as being the substantive criminal law adopted by the Holy See. Article 9 of the Penal Code, in so far as concerns offences committed by citizens abroad, provides expressly that such citizens shall be punished in accordance with Italian law provided that the accused, as was the case in the present instance, is in the territory of the State."

[Report: *Rivista di diritto internazionale*, 39 (1956), p. 192.]

States as International Persons—Miscellaneous—Governmental Instrumentalities—Chinese Delegation to Allied Council for Japan as Governmental Agency of Republic of China.

See p. 210 (*Republic of China* v. *Chuka Newspaper Co., Ltd., et Al.*).

[[1] See *International Law Reports*, 1952, p. 142.]

PART III

STATE TERRITORY

A—IN GENERAL

I.—Nature of Territorial Sovereignty

Territory—Nature of Territorial Sovereignty—Panama Canal Zone—Whether a " Possession " of the United States—Carriage by Sea—Bill of Lading—Clause Applicable to " Shipments from United States Ports "—Whether Cristobal Such a Port—Isthmian Canal Convention, 1903.

STAFFORD ALLEN & SONS LTD. *v.* PACIFIC STEAM NAVIGATION CO.

England, Court of Appeal. April 19, 1956.

(Denning, Birkett and Parker L.JJ.)

THE FACTS.—By Article 3 of the Isthmian Canal Convention, signed in 1903, the Republic of Panama granted to the United States of America

> " all the rights, power and authority within the [Panama Canal] Zone . . . which the United States would possess and exercise if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority ".

By s. 3 (8) of the United States Carriage of Goods by Sea Act, 1936, a covenant purporting to relieve shipowners from liability for negligence was void, and s. 13 of the Act provided:

> " This Act shall apply to all contracts for carriage of goods by sea . . . from ports of the United States in foreign trade. As used in this Act the term ' United States ' includes its districts, territories, and possessions . . . Provided further, that every bill of lading . . . which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act."

In 1952 certain goods were shipped from Cristobal, a port in the Panama Canal Zone, to London, on the terms of the usual bill of lading used by the shipowners, which was expressly governed by English law. The bill contained an exemption clause which, *prima facie*, would be wide enough to exempt the shipowners from liability for negligence, but there was also inserted a paramount clause that " With respect to shipments . . . from a port in the United States, all the terms and provisions of the United States Carriage of Goods by Sea Act, 1936 " were to apply to the contract contained in the bill. During transit the goods were damaged. In an action by the owners of the goods for damages for negligence, the shipowners took the preliminary point that, assuming the goods were damaged by their negligence, they were protected by the exemption clause in the bill of lading. The case turned, therefore, on the question whether Cristobal was " a port of the United States " within the meaning of the paramount clause, with the consequence that the exemption clause would be rendered null and void by the application of s. 3 (8) of the United States Carriage of Goods by Sea Act, 1936.

Sellers J., in the Court below, gave judgment for the plaintiffs, the owners of the goods. The defendants, the shipowners, appealed.

Held: that the appeal must be dismissed. The shipowners were not protected by the exemption clause from liability for negligence, since on the true construction of the bill of lading the scope of the application of the paramount clause was intended to be co-extensive with the application of the local law, *viz.*, the United States Carriage of Goods by Sea Act, 1936; and on the evidence before the court the Panama Canal Zone was a possession of the United States to which the Act of 1936 applied.

Denning L.J., after stating the facts, said: " The sole question, therefore, in this case, is whether the shipment from Cristobal to the Panama Canal Zone was a shipment from ' a port in the United States ' within the meaning of that clause paramount. In ordinary use the term ' United States ' means the continental area of the United States of America, and does not include outlying possessions such as the Panama Canal Zone. In construing this clause, however, we must have regard to the law of the port of shipment. We must, I think, attribute to the shipowners an intention to do what is lawful by the local law. If the law of the Panama Canal Zone requires a shipowner to insert a clause paramount so as to deprive the shipowner of the benefit of the exempting clause, we should construe the bill of lading so as to comply with that law rather than to ignore it.

" What, then, is the law of the Panama Canal Zone on this matter? It is said to be contained in the United States Carriage of Goods by Sea Act, 1936, which says in s. 13 that:

> " ' This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade . . .'

Then there are these important words:

> " ' As used in this Act the term " United States " includes its districts, territories, and possessions . . .'

Later on the section provides for a clause to be inserted in every bill of lading:

> " ' Provided further, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by

> sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act.'

" The crucial words of s. 13 of the Act for present purposes are these: '. . . the term " United States " includes its districts, territories, and possessions '. The Panama Canal Zone is not a ' district ' of the United States like the District of Columbia. It is not a ' territory ' of the United States, if we accept the ruling to that effect of the Appellate Court of Illinois in *Macomber & Whyte Rope Co.* v. *United Fruit Co.* (*State of Illinois*) ((1922), 225 Ill. App. 286). The question is whether the Canal Zone is a ' possession ' of the United States. We have been supplied on this point with an agreed statement of facts relating to Cristobal and the Canal Zone, and we have been referred to all the relevant authorities in the United States on the subject.

" Cristobal is a port on the eastern shore of Limon Bay near the entrance to the Panama Canal from the Caribbean Sea; and the Zone is a stretch of land in the Isthmus of Panama extending generally five miles on each side of the centre line of the Panama Canal. The rights of the United States of America in and over the Zone derive from the Isthmian Canal Convention between the United States of America and the Republic of Panama, signed on Nov. 18, 1903, Art. 3 of which says:

> " 'The Republic of Panama grants to the United States all the rights, power and authority within the Zone . . . which the United States would possess and exercise if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.'

" The United States Supreme Court in *Luckenbach S.S. Co.* v. *United States* ((1930) 280 U.S. 173[1]), held that a port in the Panama Canal Zone was a ' foreign port '. That was a special decision on a special statute. It arose out of the fact that there was a subsidy in respect of the carriage of mails from certain ports within the United States to foreign ports. If there was carriage to the ports of Panama or to Colon, which are not in the Canal Zone but in the Republic of Panama, the shipowners would get the subsidy. It was argued that, if the mails went to Balboa or Cristobal, which are in the Canal Zone next door to those ports, the subsidy would not be payable. That would be contrary to a long current of practice, and the Supreme Court held that the subsidy was payable to the shipowners whether the mails were carried to Panama or Colon in the Republic of Panama, or to Balboa or Cristobal in the Canal Zone. The case is not of general application.

" Relieved of that case, it seems to me that, if we give the word ' possession ' in this Act its ordinary meaning, then the Canal Zone is a possession of the United States. In *The American Law of Ocean*

[[1] See *Annual Digest*, 1929–1930, Case No. 50.]

Bills of Lading, at p. 149, Mr. Arnould Knauth, dealing with the definition in s. 13 of the Act of 1936, says: ' The term " United States " includes the Canal Zone at Panama, Alaska, Hawaii, Midway, and Guam . . .' and other places. In *The Canal Zone Code*, which is a publication embodying all the laws applicable to the Canal Zone, in the Cumulative Supplement No. 2, at p. 124, the compiler states in regard to the Act of 1936:

> " ' It would seem that this Act is applicable to contracts for the carriage of goods by sea to or from the ports of the Canal Zone, in foreign trade.'

In the course of the case, inquiry was made, on behalf of the parties, of the United States authorities on the matter, and a report by them tells us that the Panama Canal Company has successfully maintained the applicability of the Act to the Canal Zone in two or three law suits in the United States District Court for the District of the Canal Zone. The decisions are unreported, the cases being decided on demurrer or in similar ways.

" On the material which has been put before this court, it seems to me that the term ' United States ' in the Act of 1936 includes the Panama Canal Zone. If this conclusion is right, it means that the local law affecting shipments from Cristobal requires the shipowners to insert in the bill of lading a paramount clause bringing into operation the United States Carriage of Goods by Sea Act, 1936. That is a most material circumstance which we must bear in mind when construing this paramount clause. So construed, it seems to me that a ' port in the United States ' in the clause means a port in the United States, its districts, territories or possessions. Cristobal is such a port. The paramount clause, therefore, brings into operation the terms and provisions of the United States Carriage of Goods by Sea Act, 1936, and by those provisions the exempting clause is rendered null and void. For these reasons, it seems to me that the shipowners cannot rely on the exempting clause. The paramount clause is not an exception on an exception. It is paramount. I think, therefore, that the appeal should be dismissed."

Birkett L.J. said: " I am of the same opinion, and, in view of the judgment of my Lord, I can confine my observations to a brief space. The simple question is: Does the Carriage of Goods by Sea Act, 1936, of the United States apply in this case? If the Act does apply, then immediately another question arises, and that is on the meaning of cl. 29 in the bill of lading, the clause paramount, because it is the wording of that clause on which so much dispute both here and in the court below has taken place. Clause 29b reads:

> " ' U.S.A.: With respect to shipments (other than live animals and deck cargo) from a port in the United States, all the terms and provisions of the Carriage of Goods by Sea Act, 1936, of the United States are to apply to the contract contained in this bill of lading.'

At first sight it would seem difficult to assert that Cristobal in the Panama Canal Zone was ' a port in the United States '. The United States, as people have been wont to consider them, are the forty-eight states which have been federated together forming the United States. When, however, one begins to examine that, apparently, simple matter, great difficulties immediately arise. In the Act of Congress of 1936, the Carriage of Goods by Sea Act, 1936, s. 13, appears to deal with this point:

> " ' This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term " United States " includes its districts, territories, and possessions . . .'

Thus, the term ' United States ' is enlarged from the conception of the forty-eight states, as we normally think of them, to the United States plus any of its territories, any of its districts, or any of its possessions.

" To show how complicated the matter is, there was cited to us *Luckenbach S.S. Co.* v. *United States* [see *supra*, p. 118, n. 1] in the Supreme Court, a judgment of Taft C.J., who had taken the position of Chief Justice after holding the high office of President of the United States. The question for determination in that case dealt with kindred matters, and it was held that ports in the Canal Zone were to be regarded as foreign ports within the meaning of the particular statute with which the court was there concerned. I think that one of the governing considerations in that decision of the Supreme Court was that the court had before them a decision to which they attached great weight, namely *United States* v. *Alabama Great Southern Railroad Co.* ((1892), 142 U.S. 615), where the court said (*ibid.*, at p. 621):

> " ' We think the . . . construction . . . given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case—should be considered as decisive in this suit.'

I think the reason for the decision in *Luckenbach S.S. Co.* v. *United States* [*supra*] was that traders had traded in the faith that the ports of Panama Zone should be regarded as foreign ports for the purposes of carrying mails, and, accordingly, the court held that for this specific purpose, under this particular statute with regard to the carriage of mails, the ports of the Panama Zone were foreign ports.

" The present case is not to be decided by merely saying the Supreme Court of the United States held that ' the United States ' meant this or that, or ' the Panama Zone ports ' meant this or that in any particular case within the meaning of the statute. We have, I think, to look at the particular document with which we are concerned, and to construe it accordingly.

" We had before us the opinion of Mr. Penifer, the counsel of the American Department, and Sellers, J., paid great attention to that opinion, which is an extensive review of the question in this case. It arose because Sellers, J., felt that it would be helpful to the court to have an authoritative view expressed. The opinion, which was given on Nov. 15, 1955, states:

" ' Reference is made to the memorandum of Nov. 1, from the office of the Legal Adviser of the Department of State to you requesting an opinion as to the applicability of s. 13 of the United States Carriage of Goods by Sea Act, 1936, to a shipment in foreign trade from Cristobal under a bill of lading providing . . .'

The provision is then set out, as in the clause paramount. Then comes this passage:

" ' According to Clyde & Co., the solicitors who made the request to the London Embassy, the two issues are whether Cristobal was to be regarded as a port in the United States, and whether the Canal Zone is a district, possession or territory of the United States within the meaning of s. 13 of the United States Carriage of Goods by Sea Act, 1936.'

The following pages deal with the matter in great detail, setting out the relevant decisions which have been made and which might be of assistance, and the opinion concludes:

" ' The position of the Panama Canal Co. that the Carriage of Goods by Sea Act is applicable to the Canal Zone and is part of the Canal Zone Code is consonant with the ruling of the Supreme Court of the United States in *Panama Railroad Co.* v. *Johnson* ((1924) 264 U.S. 375), which is cited in respect to the requirements of the constitution of uniformity of maritime law throughout the territorial limits of the United States government.'

" Sellers, J., in his judgment, expressly said that he accepted the opinions which had been given with such care on the precise questions which had been addressed to him and which were the issues and questions raised in the case.

" The second matter is that an opinion given by a New York lawyer, Mr. Arnould Knauth, of the New York Bar, was before the learned judge. In the preface to *Carver's Carriage of Goods by Sea* (9th Edn.) (1952), the editor goes out of his way to thank Mr. Arnould W. Knauth of the New York Bar for ' his valuable help with regard to United States law ', and I take it that the author of the opinion is the New York lawyer to whom that acknowledgment is made, because in a note to s. 13 of the United States Carriage of Goods by Sea Act, 1936, which is set out in Carver, at pp. 1110, 1111, it is stated, at p. 1111: ' Thus, " United States " here includes the Canal Zone at Panama, Alaska . . . Guam . . .' and various other places. Sellers, J., was also influenced by that matter. Having regard to the evidence which was set out in the agreed statement of facts, I see no difficulty in this case in holding that Cristobal is a port in one of the possessions of the United States of America, although its precise position is as Denning L.J., stated, quoting from the agreed statement of facts. If that be right, it would follow, I think, that the provisions of the Carriage of Goods by Sea Act, 1936, apply in this case, and I am of opinion that they do. In those circumstances, it seems to me that the view which was formed by Sellers, J., was the right one, and that this appeal ought to be dismissed."

Parker L.J. said: " I agree, and I would only add a few words in deference to the argument of counsel for the shipowners. He contended, in the first instance (and I think rightly), that the application of the Carriage of Goods by Sea Act, 1936, of the United States is a conditional application. Accordingly, the first question is on the construction of that condition. His argument goes on: If that construction is clear, it is unnecessary to look at anything further, and, indeed, it would be wrong to go on and construe as contractual terms the terms of the Act of the United States. Only if the condition is ambiguous, so runs the argument, would it be relevant to consider that Act. It is at that point where I part company with counsel.

" The object in any question of construction is to ascertain what the parties intended by the words which they used. When one is construing a contract or other written document, I think in every case it is for the court to bear in mind the context in which the words are used, including the position of the parties, the nature of the transaction, the object of the venture. In this case the plaintiffs are the owners of goods on a steamship owned by the defendant shipowners. The contract in question is a bill of lading evidencing a contract for the carriage of those goods. It is well known that both the United States and this country have adopted the Hague Rules. Accordingly, when one comes across a clause paramount dealing with shipments from ports of Canada and ports in the United States, it is perfectly obvious to anybody in trade why the paramount clause has been inserted by the shipowners. It is an insertion very much against their interest, because it, in effect, cuts out the elaborate exception clause on which otherwise they might rely. They have done it in order to comply with the local law, the law of Canada and the law of the United States. Accordingly, unless there are clear words to the contrary, one must presume, I think, that the application of the clause is coextensive with the application of the Act.

" At that point it becomes, therefore, necessary to consider what is the ambit of the Act of the United States. My Lords have dealt with that fully. In these courts foreign law is a matter of fact, and it is sufficient for me to say that there was evidence here—true not cross-examined to, and perhaps not made as clear as one might have hoped—that, for the purposes of the Act of 1936, Cristobal in the Canal Zone is a possession of the United States within the definition in that Act. It seems to me clear, on the opinion of Mr. Penifer, that, at any rate, in the courts of the Canal Zone, it would be held that Cristobal was a possession of the United States. He referred to the fact that there have been two, or possibly three, cases, true unreported, in the Canal Zone courts where the courts have so held. I would dismiss the appeal."

[Report: [1956] 2 All E.R. 716.]

II.—Acquisition of Territorial Sovereignty

iii.—Cession. Plebiscite

State Territory—Acquisition of Territorial Sovereignty—Cession—Acquisition by Greece of Sovereignty over Mainland Territories and Islands of Aegean Sea—Examination of Treaties—Critical Dates—Retroactive Effect of Treaty of Athens, 1913—Peace Treaties of 1919-1923—Treaty of Lausanne, 1923.

See p. 659 (*Lighthouses Arbitration between France and Greece*), at pp. 664-668.

State Territory—Acquisition of—Cession—State Succession on.

See p. 106 (*Lighthouses Arbitration between France and Greece—Claim No. 12a*).

IV.—Effects of Changes of Sovereignty

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: E, State Succession.]

State Territory—Effects of Changes of Sovereignty—Effect on Treaties—Incorporation of Austria into German Reich—Effect on Treaties Concluded between Austria and Germany—Lapse of Double Taxation Agreement of 1922.

DOUBLE TAXATION AGREEMENT (AUSTRIA) CASE.

Austria, Administrative Court. October 2, 1956.

THE FACTS.—The appellant was a German national and the owner of a circus. The registered address of the circus was at Munich (Germany), where its administrative business was transacted. From time to time the circus gave performances in various Austrian towns, and the Austrian revenue authorities assessed the appellant's German employees for certain Austrian taxes on their income. The appellant objected to these assessments and contended that, by virtue of the Double Taxation Agreement of May 23, 1922, between

Austria and the former German Reich, her employees were exempt from most of the taxes for which they had been assessed. The Austrian revenue authorities contended that the Double Taxation Agreement had lapsed in 1938 as a result of the annexation of Austria by the German Reich, and that acordingly only Austrian revenue law applied.

Held: that the contention of the revenue authorities must be upheld and the appeal dismissed.

The Court said (in part): " Both parties refer to the provisions of the Double Taxation Agreement. These provisions, however, lost their effect as the result of the loss by Austria of her legal personality in 1938 and the subsequent introduction of German revenue law in Austria. The legal position so created was not modified when in 1945 Austria regained her legal personality. The fact that the Austrian Ministry of Finance issued a Direction, by agreement with the German Ministry of Finance, to the effect that the provisions of the Double Taxation Agreement were to apply, is immaterial. This Direction is without legal effect because it was not published in the Federal Statutes. It follows that as the provisions of the Double Taxation Agreement do not apply in the present case, the question must be determined exclusively in accordance with Austrian revenue law ."

[Report: Vw GH, Zl 3335/54.]

VI.—International Leases. Grants in Perpetuity. Bases in Foreign Territory

Military Bases in Foreign Territory—Military Base Agreements —Authority of Base Officers to Enforce Local Laws.

LIWANAG *v.* HAMILL.

Philippines, Supreme Court. February 27, 1956.

THE FACTS.—The respondent, an officer of the United States Air Force stationed at Clark Air Force Base in the Philippines as Assistant Base Provost Marshal, filed a complaint against the petitioner alleging that the petitioner had, while on the Base, violated a Philippine tax statute. After the Justice of the Peace Court had denied his motion to quash the complaint, the petitioner sought a writ of prohibition in the Court of first instance, alleging that the respondent was not authorized to file the complaint because he was not a peace officer of the Philippines, and that for this reason the Justice of the Peace Court lacked jurisdiction to conduct a preliminary investigation of the alleged offence. The respondent appealed from a decision of the Court of first instance granting the writ of prohibition.

Held: that the judgment of the Court of first instance granting the writ must be reversed. Provost marshals of military bases established by agreement between the Philippines and the United States of America had authority to file complaints for violation of Philippine laws.

The Court said: " It is admitted that the Provost Marshal of Clark Field is a peace officer. Provost Marshals in Army bases are police officers, and they have the powers and duties of chiefs of police in municipalities.

" 'An officer appointed in an army in camp, garrison, or the field, to preserve order as head of the military police, arrest soldiers guilty of offenses of a general nature, secure prisoners properly delivered into his custody by military or naval authority, and to perform other duties pertaining to police and discipline.' (Webster's *International Dictionary*, second edition, unabridged, p. 1995.)

" The essence of the decision appealed from is that as the Provost Marshal of Clark Field is not a peace officer of the Republic of the Philippines, he is not authorized to file a complaint for violation of the Internal Revenue Code. We find this theory to be incorrect. Under the agreement between the Republic of the Philippines and the United States of America, for the establishment of bases by the latter within the territory of the former[1], laws of the Philippines continue to be in force in said bases except when otherwise agreed upon in the agreement. And for the purpose of hearing cases therein, justices of the peace are appointed and hold office. They are not appointed by the United States of America, but by the President of the Philippines, subject to confirmation by the Commission on Appointments. But other than justices of the peace, no other officers of the Republic of the Philippines are appointed in the bases, much less peace officers, although agents of the Republic of the Philippines may have access in the bases to see that the laws of the Philippines are enforced. But the question of peace and order within the bases is left to peace officers of the United States of America, the chief of whom is the provost marshal. To allow peace officers of said Republic to go therein and make arrests or institute prosecutions for violation of Philippine laws would certainly give occasion for conflicts of authority. So no provision is made for the appointment of peace officers of the Republic of the Philippines within the bases, and it is understood that the enforcement of Philippine laws is left to the officers of the United States of America. It is illogical to deny to these peace officers (of the United States) the power to prosecute violations of Philippine laws in the military bases. Since these

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[[1] Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, March 14, 1947 (*U.N.T.S.*, vol. 43, p. 271).]

bases were established the Republic of the Philippines has abstained from appointing peace officers of its own; this must have been with the understanding that the execution of Philippine laws would be taken care of therein by the peace officers of the United States of America. It would be inconvenient if not detrimental to the enforcement of the laws of the Philippines for peace officers of the Republic of the Philippines alone to be the ones authorized to prosecute offenses before the justice of the peace courts established in the bases. It is, furthermore, technical ceremony to allow a provost marshal to apprehend violators of Philippine laws and deny him the authority to prosecute such offenses before a Philippine court established inside the bases. Such was never in the contemplation of the parties when the agreements regarding the bases were entered into. The absence of peace officers of the Republic of the Philippines in these bases is due to the fact that the enforcement and prosecution of offenses against Philippine laws was intended to be lodged with the peace officers of the United States of America.

" We hold that provost marshals in military bases established by agreement between the Republic of the Philippines and the United States of America have the power and authority to file complaints for violation of Philippine laws."

[Report: *Official Gazette*, 52 (1956), p. 1396.]

VII.—Sovereignty Over the Air

i.—Air Navigation Conventions

Air Law—Warsaw Convention of 1929 on International Carriage by Air—Interpretation of Term " Doing Business ".

See p. 493 (*Berner et Al.* v. *United Airlines et Al.*).

B—PARTS OF STATE TERRITORY

II.—Rivers

iii.—International Rivers

(b) FUNCTIONS AND COMPETENCE OF INTERNATIONAL COMMISSIONS ON INTERNATIONAL RIVERS

State Territory—Rivers—International Rivers—Functions and Competence of International Commissions on—Construction of Works on River—Obligations of Riparians under Treaty—The Rio Grande—Claims in Municipal Law Based upon Treaty Obligations—The Law of the United States of America.

See p. 360 (*Falcon Dam Constructors et Al.* v. *United States*).

III.—Territorial Waters

v.—Coasting Trade and Fisheries

[*See also* PART IV, JURISDICTION: I, Territorial.]

Territorial Waters—Coastal Trade and Fisheries—Prohibition of Fishing Within Three Miles of Coast—Whether " Coast " Includes Islands Near Coast—The Law of France.

Re FORNASERO.

France, Court of Cassation. June 26, 1956.

THE FACTS.—A French Decree of 1862 prohibited fishing by foreign fishermen within three miles of the coast. The accused contended that fishing within three miles of the Island of Riou, a small island near the French coast, was not prohibited by the Decree.

Held: that fishing by foreign fishermen was prohibited not only within three miles of the mainland, but also within three miles of low-water mark of the Island of Riou.

The Court said: " It is stated that F. was found trawler-fishing less than three miles from the coast of the Island of Riou, a small island off the coast of the mainland, which is several metres above the level of the sea and charted on maps. The Court of Appeal was right in finding him guilty of a violation of the Decree of May 10, 1862. This Decree is of general application and protects fisheries over the whole extent of French territorial waters as far as three miles from the coast, without drawing a distinction between the coasts of the mainland and of an island."

[Report: *Bulletin de la Cour de Cassation*, 1956, p. 898.]

Territorial Waters—Acquisition of Nationality by Birth in—The Law of Argentina.

See p. 371 (*Re Delgado de Román*).

V.—Continental Shelf

State Territory—Parts of—The Continental Shelf—Vessel on High Seas Over—Not Within Dominion and Control of Littoral State.

MATSON NAVIGATION CO. & UNION OIL CO. OF CALIF. *v.* UNITED STATES.

United States, Court of Claims. June 5, 1956.

THE FACTS.—The claim of the Union Oil Co. related to the sinking of its tanker, the *Montebello*, by a Japanese submarine on December 23, 1941, at a point three to five and a half miles off the shore of the United States but over the continental shelf. The basis for the plaintiff's claim was that the loss of the vessel was within the free insurance against war damage provided by the Reconstruction Finance Corporation Act, § 5 (g), as added by the Act of March 27, 1942, § 2 (56 Stat. 175), as regards " property situated in the United States . . . and in such other places as may be determined by the President to be under the dominion and control of the United States." The President of the United States on September 28, 1945, had proclaimed that

> " . . . the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control " (Presidential Proclamation No. 2667 (59 Stat. 884)).

The plaintiff contended that the Proclamation demonstrated that the seas over the continental shelf were under the " dominion and control of the United States ". A bill for the relief of the Union Oil Co. was referred by the Congress to the Court of Claims with a request for the views of the Court on the " nature and character of the demand " and the amount, if any, due to the claimant.

Held: that the plaintiff did not have a legal or equitable claim against the United States for the loss of the vessel. A vessel on the high seas over the continental shelf is not in a place under the " dominion and control " of the United States, since the high seas were not affected by the Proclamation of the President. In any event, the Proclamation was issued after the sinking and was solely prospective in operation.

The Court said, after discussing a related claim and matters of the municipal law of the United States: " The remaining legal question is whether the *Montebello* was, for purposes of determining whether its cargo was covered by the free insurance, ' situated in the United States ' or in a place ' determined by the President to be under the dominion and control of the United States ' when sunk. The jury found that the *Montebello* was sunk beyond the 3-mile limit and Union's suit was dismissed by the District Court. It is conceded that the *Montebello* was over the continental shelf when sunk.

" Union contends that the Presidential Proclamation 2667, Sept. 28, 1945, 59 Stat. 884, entitled ' Policy of the United States with respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf ', established that the *Montebello* was sunk in the United States or in a place determined by the President to be under the dominion and control of the United States.[1]

" Union's contention is not well founded. Vessels on the high seas are not within the United States and while on the high seas are not in a place under the dominion and control of the United States. The Presidential Proclamation specifically stated: ' The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.' Further, the Presidential Proclamation was after the *Montebello* was sunk, and the terms of the Proclamation indicate it was prospective only. Also, the Proclamation was before the trial of the case in the District Court, and since Union could have raised that question there it is *res judicata. Cromwell* v. *County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195. . . ."

(The Court also concluded that the plaintiff had no equitable claim against the United States.)

[Reports: 135 Ct. Cl. 526, 141 F.Supp. 229, [1956] A.M.C. 1437.]

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[1] ". . . Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

" Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected. . . ."

PART IV

JURISDICTION

A—IN GENERAL. TERRITORIAL AND PERSONAL

I.—Territorial

i.—Over Territory in General and Persons and Property Situated therein. Territorial Limits of Jurisdiction. Expropriation of Alien Property.

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: A, IV, Recognition of Acts of Foreign States and Governments, *and* D, Recognition of States and Governments.]

Jurisdiction—Territorial—Limits of—Extraterritorial Application of Anti-Trust Laws—Combination of Foreign and Domestic Companies in Restraint of Trade—Agreements Concerning Territories of Sale—Exchange of Patents and Technical Information—The Law of the United States of America.

UNITED STATES *v.* HOLOPHANE CO., INC.

United States, District Court, Southern District, Ohio. February 3, 1954.

Supreme Court. November 13, 1956.

(Warren C.J.; Black, Reed, Frankfurter, Douglas, Burton, Clark, Brennan JJ.)

THE FACTS.—This was an action to restrain the defendant, a United States corporation, from engaging in an allegedly unlawful combination and conspiracy and from being a party to contracts allegedly in restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Anti-Trust Act (26 Stat. 209, 15 U.S.C. § 1). That section provides:

> " Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal: . . ."

Holophane Limited, a British company (hereinafter referred to as " Limited "), and Société Anonyme Française Holophane, a French corporation (hereinafter referred to as " Française "), were named as co-conspirators with the defendant. The three corporations manufactured and sold prismatic glassware.

In 1921 the British company granted to the French corporation an exclusive licence to manufacture prismatic glassware produced under the existing and future patents of the British company, and the exclusive right to sell such products in Belgium, Spain, Portugal, Switzerland, and Italy. The agreement provided for the payment of royalties, the marking of all such products with the name "Holophane", and the mutual exchange of discoveries and improvements, and prohibited the export of Holophane products by one company to territory served by the other. The agreement remained in effect until the time of the trial.

The manufacture and sale of Holophane products in the United States was originally carried on by a wholly-owned subsidiary of the British company. In 1925, all of the shares in the subsidiary were sold to a group of American purchasers, and the defendant's predecessor was formed. In 1929, after several mergers, the defendant assumed its present identity.

In 1925, the defendant's predecessor corporation and the British company had entered into a trade and licensing agreement, which with slight modifications remained in effect until the time of the trial. The essential features of the agreement were:

(*a*) The territory of the defendant's predecessor was to include North America, Cuba, the Philippines, and Japan. The territory of the British corporation was to be the whole of the world, except the territory of the defendant's predecessor and France and its colonies.

(*b*) Each party would prevent the exportation of its products from its territory to that of the other, except with the latter's consent.

(*c*) Each party would not carry on trade in the territory of the other, except at the latter's request.

(*d*) Each party would not seek patent or trade mark protection in the territory of the other, except at the latter's request.

(*e*) Each party would communicate and assign all inventions, designs, discoveries, improvements, and trade marks to the other.

(*f*) Each party would supply the other with Holophane products at a stipulated discount.

A substantially similar agreement was executed between the defendant's predecessor and the French corporation; this defined the territory of the latter as France and its colonies.

In 1944, the British company and the defendant entered into an agreement whereby the former sold its South American territory to the American corporation and brought that territory within the agreement of 1925. Similar arrangements concerning the South American territory were made between the French corporation and the defendant in 1947. An inter-company buying agreement of 1945 between the British company and the defendant defined the circumstances under which one company would be permitted to supply goods and services in the territory of the other. The defendant and its co-conspirators were found to have complied with and enforced these agreements.

Held (by the District Court): that the Government was entitled to the decree sought. The defendant and its co-conspirators had been engaged in a combination and conspiracy in restraint of trade and commerce in prismatic glassware among the States of the United States and with foreign nations and were parties to contracts in restraint of such trade, in violation of Section 1 of the Sherman Act.

In the relevant " Findings of Fact and Conclusions of Law ", the Court said: " In fulfillment of its obligations under the agreements with ' Limited ' and ' Française ', the defendant has imposed upon its customers and dealers contractual obligations not to export products purchased from it into the territory of ' Limited ' and ' Française '. The defendant rejects orders and requests for quotations from its customers whenever it suspects that the order is to be shipped into the territory of either ' Française ' or ' Limited ' and refers such customers either to ' Française ' or ' Limited '. This practice of the defendant has substantially affected the foreign commerce of its customers.

" Although the defendant's answer alleges that the restrictive agreements were ' reasonable and necessary for the protection of the business and good will sold ', the defendant failed to establish this defense. Moreover, the defendant failed to establish that the agreements were subordinate to the alleged lawful purpose. The evidence establishes that the restrictive agreements were designed to eliminate competition between the parties and with outsiders in all markets of the world, and were neither measurable by, limited to, nor subordinate to the reasonable necessities of the sale.

" The restrictive arrangements between the defendant and the co-conspirators, ' Limited ' and ' Française ', are in unreasonable restraint of the interstate and foreign commerce of the United States in prismatic glassware and appliances containing prismatic glassware.

" The intended effects of the agreements between the defendant and the co-conspirators will continue unless prevented by this Court.

" Conclusions of Law.

" 1. The court has jurisdiction of the subject matter hereof and of the defendant, and the complaint states a cause of action against the defendant under the provisions of the Act of July 2, 1890, entitled ' an Act to protect trade and commerce against unlawful restraints and monopolies ', as amended, commonly known as the Sherman Act, 15 U.S.C.A. § 1 *et seq.*

" 2. Beginning in or about 1925 and continuing at all times thereafter to the date of these findings, the defendant and the co-conspirators have been continuously engaged in a combination and conspiracy in restraint of trade and commerce in prismatic glassware and illuminating appliances containing prismatic glassware among the several states of the United States and with foreign nations and have been and are now parties to contracts, agreements and understandings in restraint of such trade and commerce; all in violation of Section 1 of the Sherman Act.

"3. Plaintiff is entitled to a decree." [Report: 119 F. Supp. 114.]

In the decree, the defendant was restrained from performing or claiming rights under the agreements, which were declared to be illegal; from carrying on any combination or conspiracy with the British and French corporations; from exchanging patents; and from giving effect to the arrangements concerning sales territories agreed upon. It was required to notify its customers and the foreign Holophane corporations of certain aspects of the decree and "to use reasonable efforts to promote the sale and distribution of said products in foreign markets, including the territories of" the British and French corporations (Paragraph XI). (Text in *Transcript of Record*, p. 693.)

On appeal,

Held (by the Supreme Court): that the decree must be affirmed *per curiam* by a unanimous Court, with the exception of Paragraph XI, which was affirmed by an equally divided Court.

[Reports: 352 U.S. 903, 1 L.Ed. 2d 114, 77 Sup. Ct. 144.]

NOTE.—The above case is reported because of its significance as regards the extraterritorial application of the anti-trust laws of the United States. The case is noted in *Cornell Law Quarterly*, 42 (1957), p. 390. It is discussed in Brewster, *Antitrust and American Business Abroad* (1958), pp. 237–238, which deals at length with the questions of international and municipal law and of policy involved in the extraterritorial reach of the American anti-trust laws.

It is reported in the above treatise by Professor Brewster (at p. 238) that after the argument of the case, the Solicitor General wrote to the Clerk of the Supreme Court on November 8, 1956, that the United States interpreted the decree in the above case as not requiring the defendant to sell abroad if such sales were "precluded by the exercise of sound business judgment, formulated without regard to the prior unlawful restraint of trade," but that the trial Court "must be satisfied that any such business judgment was arrived at solely on the basis of business considerations and was not influenced by unlawful motives or purposes."

Jurisdiction—Territorial—Protection of Industrial Property—Trade-Marks—Infringement Committed in Foreign Country by Foreign National—Extraterritorial Application of National Law—International Convention for the Protection of Industrial Property, 1934—As Limiting Law to Territorial Application—Treaties—Operation of—Self-Executing Treaties—Municipal Legislation—The Law of the United States of America.

VANITY FAIR MILLS, INC. *v.* T. EATON CO. LTD. *ET AL.*

United States, District Court, Southern District, New York.
June 29, 1955.

Court of Appeals, Second Circuit. June 1, 1956.

THE FACTS.—This was an action for trade-mark infringement and unfair competition in both the United States and Canada. The proceedings here reported arose on the defendant's motion to dismiss. For this purpose, the truth of the facts stated in the complaint is assumed. The facts so stated were as follows:

The plaintiff, an American corporation, had been engaged in the manufacture and sale of women's underwear under the name " Vanity Fair " since 1914 and had sold its products in Canada from 1917 onward. The trade-mark " Vanity Fair " had been registered with the United States Patent Office in 1914.

The defendant, a Canadian corporation, was engaged in retail merchandising in Canada; it had a place of business in New York. In 1915 it had registered the trade-mark " Vanity Fair " for use in connection with women's outerwear. In 1933, in response to a request of the Canadian Registrar of Trade-Marks, the defendant listed women's underwear as the goods in connection with which it had actually been using the mark " Vanity Fair," and the registration was modified accordingly.

During the years 1945–1953, the defendant ceased to use its own " Vanity Fair " trade-mark; it purchased branded merchandise from the plaintiff and sold this merchandise under advertisements indicating that it was of United States origin and of plaintiff's manufacture. In 1953, the defendant resumed the use of its own trade-mark " Vanity Fair " and simultaneously, under the same trade-mark, sold the plaintiff's branded merchandise and cheaper merchandise of Canadian manufacture. The defendant objected to the plaintiff's sales of its merchandise to one of the defendant's principal competitors in Canada and forced that competitor to discontinue its purchases by threats of suit for infringement of the trade-mark.

The plaintiff alleged that these acts constituted a conspiracy on the part of the defendant company and its officers and its agents to appropriate for their own benefit the plaintiff's registered and common law trade-mark. It asserted that by purchasing the plaintiff's merchandise for years and by selling it as the plaintiff's goods, it had attempted to associate the plaintiff's trade-mark with itself and that, having accomplished that purpose, the defendant began using the mark " Vanity Fair " in connection with its own inferior merchandise. The plaintiff also asserted that the defendant had advertised women's underwear in the United States under the trade-mark " Vanity Fair " and that it had sold such merchandise by mail to customers in the United States.

The plaintiff's complaint sought injunctive relief against the use by the defendant of the trade-mark " Vanity Fair " in connection with women's underwear both in Canada and the United States, a declaration of the superior rights of the plaintiff in such trade-mark, and an accounting for damages and profits. The defendant moved to dismiss on the grounds that the Court lacked jurisdiction over the persons of the defendants; that it lacked jurisdiction over the subject-matter of the complaint in so far as it related to alleged trade-mark infringement and unfair competition in Canada; and that the Court was an inconvenient forum for the trial of those issues.

Held (by the District Court): that the complaint must be dismissed. The Court lacked jurisdiction over that portion of the complaint relating to the defendant's use of the trade-mark in Canada. To assume jurisdiction would require the Court to pass judgment on the validity of the acts of a foreign Government in granting or denying trade-marks. [Report: 133 F. Supp. 522.]

On appeal,

Held (by the Court of Appeals): that the judgment of the Court below must be affirmed, but with leave to amend the complaint to deal solely with the alleged trade-mark infringement and unfair competition in the United States. The International Convention for the Protection of Industrial Property accorded aliens the same treatment in each of the member countries as that country made available to its own nationals. Its purpose was not to give extraterritorial effect to the law of the parties to that Treaty. The municipal law of the United States with regard to trade-marks was inapplicable to acts committed by a foreign national in its own country under a presumably valid registration of the trade-mark in that country.

The Court said: " The initial question is whether the district court had jurisdiction over all, or only part, of the action. Plaintiff's complaint asserted federal jurisdiction both because it raised substantial federal questions under the Lanham Act, 15 U.S.C.A. § 1051 *et seq.*, and the International Convention for the Protection of Industrial Property 53 Stat. 1748, and because of the presence of diversity of citizenship and the requisite jurisdictional amount, 28 U.S.C. § 1332. Regardless of the existence of the other asserted grounds for federal jurisdiction, the allegations of diversity of citizenship and of the requisite jurisdictional amount were sufficient to vest the district court with jurisdiction over the entire action.

"Plaintiff, however, does not rely other than incidentally on diversity as the basis for federal jurisdiction, but asserts that its claims arise under the laws of the United States and should be governed by those laws. The result sought—extraterritorial application of American law—is contrary to usual conflict-of-laws principles. *First*, the legal status of foreign nationals in the United States is determined solely by our domestic law—foreign law confers no privilege in this country that our courts are bound to recognize. *Ingenohl* v. *Walter E. Olsen & Co.*, 1927, 273 U.S. 541, 47 S. Ct. 451, 71 L.Ed. 762; *United Drug Co.* v. *Theodore Rectanus Co.*, 1915, 248 U.S. 90, 39 S.Ct. 48, 63 L.Ed. 141; *Baglin* v. *Cusenier Co.*, 1911, 221 U.S. 580, 31 S.Ct. 669, 55, L.Ed. 863. And when trade-mark rights within the United States are being litigated in an American court, the decisions of foreign courts concernng the respective trade-mark rights of the parties are irrelevant and inadmissible. *George W. Luft Co.* v. *Zande Cosmetic Co.*, 2 Cir., 1944, 142 F.2d 536, 539. Similarly, the rights and liabilities of United States citizens who compete with foreign nationals in their home countries are ordinarily to be determined by the appropriate foreign law. *Ingenohl* v. *Olsen & Co.*, *supra*, 273 U.S. at page 544, 47 S.Ct. at page 452. This fundamental principle, although not without exceptions, is the usual rule, and is based upon practical considerations such as the difficulty of obtaining extraterritorial enforcement of domestic law, as well as on considerations of international comity and respect for national integrity. *Second*, the creation and extent of tort liability is governed, according to the usual rule, by the law of the place where the alleged tort was committed (*lex loci delicti*).[1] The place of the wrong (*locus delicti*) is where the last event necessary to make an actor liable takes place.[2] If the conduct complained of is fraudulent misrepresentation, the place of the wrong is not where the fraudulent statement was made, but where the plaintiff, as a result thereof, suffered a loss.[3] Thus in cases of trade-mark infringement and unfair competition, the wrong takes place not where the deceptive labels are affixed to the goods or where the goods are wrapped in the misleading packages, but where the passing off occurs, i. e., where the deceived customer buys the defendant's product in the belief that he is buying the plaintiff's.[1] In this case, with the exception of defendant's few mail order sales into the United States, the passing-off occurred in Canada, and hence under the usual rule would be governed by Canadian law.

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[1] Consult Restatement, *Conflict of Laws* §§ 377–390 (1934); Hancock, *Torts in the Conflict of Laws*, xvii, 21–53 (1952); Lorenzen, Selected Articles on the Conflict of Laws, 1 18, 360–378 (1947). The rule of *lex loci delicti* is well established both in the federal courts and in the courts of New York. See, *e. g.*, *Cuba R. Co.* v. *Crosby*, 1912, 222 U.S. 473, 32 S.Ct. 132, 56 L.Ed. 274; *Conklin* v. *Canadian-Colonial Airways, Inc.*, 1935, 266 N.Y. 244, 194 N.E. 692. *Cf.* discussion in *Walton* v. *Arabian American Oil Co.*, 2 Cir., 1956, 233 F.2d 541.

[2] Restatement, *Conflict of Laws* § 377 (1934).

[3] *Ibid.* Rules 4 and 5, Illustrations 5 and 6.

" Conflict-of-laws principles, however, are not determinative of the question whether the International Convention and/or the Lanham Act provide relief in American courts and under American law against acts of trade-mark infringement and unfair competition committed in foreign countries by foreign nationals. If the International Convention or the Lanham Act provide such relief, and if the provisions are within constitutional powers, American courts would be required to enforce these provisions.[2] It is therefore necessary to determine whether the International Convention or the Lanham Act provide such relief. Only if it is determined that they do not provide such extensive relief, and hence that the only jurisdictional basis for the suit is diversity of citizenship, do we reach the question whether the district court abused its discretion in dismissing the complaint because of *forum non conveniens*.

" I. The International Convention

" Plaintiff asserts that the International Convention for the Protection of Industrial Property (Paris Union), 53 Stat. 1748 (1883, as revised 1934), T.S.No.941, to which both the United States and Canada are parties, is self-executing; that by virtue of Article VI of the Constitution it is a part of the law of this country which is to be enforced by its courts; and that the Convention has created rights available to plaintiff which protect it against trade-mark infringement and unfair competition in foreign countries. Plaintiff would appear to be correct in arguing that no special legislation in the United States was necessary to make the International Convention effective here,[1] but it erroneously maintains that the Convention created private rights *under American law* for acts of unfair competition occurring in foreign countries.

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[1] With the exception of *George W. Luft* v. *Zande Cosmetic Co.*, 2 Cir., 1944, 142 F.2d 536, the few American cases which have involved acts of unfair competition committed in other countries have ignored these conflict-of-laws principles. In *Vacuum Oil Co.* v. *Eagle Oil Co.*, C.C.N.J. 1907, 154 F. 867, affirmed 3 Cir., 1908, 162 F. 671, *certiorari* denied 214 U.S. 515, 29 S.Ct. 696, 53 L.Ed. 1063, and *Morris* v. *Altstedter*, 1916, 93 Misc. 329, 156 N.Y.S. 1103, the courts presumed that the laws concerning unfair competition of every civilized country were identical to those of the forum. In *Hecker H-O Co.* v. *Holland Food Corporation*, 2 Cir., 1929, 36 F.2d 767, distinguished in *George W. Luft Co.* v. *Zande Cosmetic Co.*, *supra*, the court did not consider the effect of the defendant's having a presumably valid foreign trademark in deciding that the Trade-Mark Act of 1905 was violated by affixing infringing labels in the United States on goods shipped to foreign countries.

For discussions of conflict-of-laws principles as they refer to unfair competition, consult Wengler, Law Concerning Unfair Competition and the Conflict of Laws, 4 *Am.J. of Comp. Law* 167 (1955); Note, The Bulova Case: Lex Loci Delicti v. International Trade-Mark Protection, 47 *N.W.U.L.Rev.* 677 (1952); Note, The Choice of Law in Multistate Unfair Competition: A Legal-Industrial Enigma, 60 *Harv.L.Rev.* 1315 (1947).

[2] See *Steele* v. *Bulova Watch Co.*, 1952, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 319 [reported *infra*, p. 270, in this volume]; *United States* v. *Aluminum Co. of America*, 2 Cir., 1945, 148 F.2d 416, 443.

" The International Convention is essentially a compact between the various member countries to accord in their own countries to citizens of the other contracting parties trade-mark and other rights comparable to those accorded their own citizens by their domestic law. The underlying principle is that foreign nationals should be given the same treatment in each of the member countries as that country makes available to its own citizens. In addition, the Convention sought to create uniformity in certain respects by obligating each member nation ' to assure to nationals of countries of the Union an effective protection against unfair competition.'[2]

" The Convention is not premised upon the idea that the trademark and related laws of each member nation shall be given extraterritorial application, but on exactly the converse principle that each nation's law shall have only territorial application. Thus a foreign national of a member nation using his trade-mark in commerce in the United States is accorded extensive protection here against infringement and other types of unfair competition by virtue of United States membership in the Convention. But that protection has its source in, and is subject to the limitations of, American law, not the law of the foreign national's own country. Likewise, the International Convention provides protection to a United States trade-mark owner such as plaintiff against unfair competition and trade-mark infringement in Canada—but only to the extent that Canadian law recognizes the treaty obligation as creating private rights, or has made the Convention operative by implementing legislation. Under Canadian law, unlike United States law, the International Convention was not effective to create any private rights in Canada without legislative implementation.[3] However, the obligations undertaken by the Dominion of Canada under this treaty have been implemented by legislation, most recently by the Canadian Trade Marks Act of 1953, 1–2 Elizabeth II, Chapter 49. If plaintiff has any rights under the International Convention (other than through § 44 of the Lanham Act, discussed below), they are derived from this Canadian law, and not from the fact that the International Convention may be a self-executing treaty which is a part of the law of this country.

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[1] *Bacardi Corporation of America* v. *Domenech*, 1940, 311 U.S. 150, 61 S.Ct. 219, 85 L.Ed. 98 [*Annual Digest*, 1938–1940, Case No. 192]; *Master, Wardens, etc.* v. *Cribben & Sexton Co.*, Cust, & Pat. App. 1953, 202 F.2d 779, 783; *La Republique Française* v. *Schultz*, C.C.N.Y. 1893, 57 F. 37; *Kerry* v. *Toupin*, C.C.Mass. 1894, 60 F. 272, 273.

[2] Article 10 *bis* of the International Convention, 53 Stat. 1780, T.S.No.941, reads as follows

" (1) The countries of the Union are bound to assure to nationals of countries of the Union an effective protection against unfair competition.

" (2) Any act of competition contrary to honest practice in industrial or commercial matters constitutes an act of unfair competition.

" (3) The following particularly are to be forbidden: 1°. All acts whatsoever of a nature to create confusion in any way whatsoever with the establishment, the goods, or the services of the competitor; 2°. False allegations in the conduct of trade of a nature to discredit the establishment, the goods, or the services of a competitor."

See 4 Callmann, *Unfair Competition and Trade-Marks* § 99.2 (2d ed., 1950).

[3] *Albany Packing Co., Inc.* v. *Registrar of Trade Marks* [1940], Ex.C.R. 256, 265–266; *Arrow Slide & Boom Co.* v. *Pigeon Lumber Co.* [1930], 65 O.L.R. 575, 580 ff., 66 O.L.R. 577, 578 [1932], S.C.R. 495, 510.

" II. The Lanham Act

" Plaintiff's primary reliance is on the Lanham Act, 15 U.S.C.A. §§ 1051–1127, 60 Stat. 427, a complex statute conferring broad jurisdictional powers on the federal courts. Plaintiff advances two alternative arguments, the first one based on the decision of the Supreme Court in *Steele* v. *Bulova Watch Co.*, 1952, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 319 [see *infra*, p. 270], giving the provisions of the Lanham Act an extraterritorial application against acts committed in Mexico by an American citizen, and the second based specifically on § 44 of the Act, 15 U.S.C.A. § 1126, which was intended to carry out our obligations under the International Conventions.

" A. *General Extraterritorial Application of the Lanham Act—the Bulova Case.*—" Section 32 (1) (a) of the Lanham Act, 15 U.S.C.A. § 1114(1) (a), one of the more important substantive provisions of the Act, protects the owner of a registered mark from use ' in commerce ' by another that is ' likely to cause confusion or mistake or to deceive purchasers as to the source of origin ' of the other's good or services. ' Commerce ' is defined by the Act as ' all commerce which may lawfully be regulated by Congress.' § 45, 15 U.S.C.A. § 1127. Plaintiff, relying on *Steele* v. *Bulova Watch Co.*, 1952, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 252, argues that § 32 (1) (a) should be given an extraterritorial application, and that this case falls within the literal wording of the section since the defendant's use of the mark ' Vanity Fair ' in Canada had a substantial effect on ' commerce which may lawfully be regulated by Congress.'

" While Congress has no power to regulate commerce in the Dominion of Canada, it does have power to regulate commerce ' with foreign Nations, and among the several States.' Const. art. 1, § 8, cl. 3. This power is now generally interpreted to extend to all commerce, even intrastate and entirely foreign commerce, which has a substantial effect on commerce between the states or between the United States and foreign countries. *Thomsen* v. *Cayser*, 1917, 243 U.S. 66, 88, 37 S.Ct. 353, 61 L.Ed. 597; *N.L.R.B.* v. *Jones & Laughlin S. Corp.*, 1937, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893; *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 1948, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328; *Moore* v. *Mead's Fine Bread Co.*, 1954, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145; *Branch* v. *Federal Trade Commission*, 7 Cir., 1944, 141 F.2d 31. Particularly is this true when a conspiracy is alleged with acts in furtherance of that conspiracy taking place in both the United States and foreign countries. *United States* v. *Sisal Sales Corporation*, 1927 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042;[1] *United States* v. *Imperial Chemical Industries*, D.C.S.D.N.Y.1951, 100 F.Supp. 504; see Note, Application of the Anti-Trust Laws to Extra-Territorial Conspiracies, 49 *Yale L.J.* 1312 (1940) and cases cited therein. Thus it may well be that Congress could constitutionally provide infringement remedies so long as the defendant's use of the mark has a substantial effect on the foreign or inter-state commerce of the United States. But we do not reach this constitutional question because we do not think that Congress intended that the infringement remedies provided in § 32 (1) (a) and elsewhere should be applied to acts committed by a foreign national in his home country under a presumably valid trade-mark registration in that country.

" The Lanham Act itself gives almost no indication of the extent to which Congress intended to exercise its power in this area. While § 45, 15 U.S.C.A. § 1127, states a broad definition of the ' commerce ' subject to the Act, both the statement of Congressional intent in the same section[2] and the provisions of § 44, 15 U.S.C.A. § 1126, indicate Congressional regard for the basic principle of the International Conventions, i. e., equal application to citizens and foreign nationals alike of the territorial law of the place where the acts occurred. And the Supreme Court, in *Steele* v. *Bulova Watch Co.*, 1952, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 319 [see *infra*, p. 270], the only other extraterritorial case since the Lanham Act, did not intimate that the Act should be given the extreme interpretation urged upon us here.

" In the *Bulova* case, *supra*, the Fifth Circuit, 194 F.2d 567, assuming that the defendant had a valid registration under Mexican law, found that the district court had jurisdiction to prevent the defendant's use of the mark in Mexico, on the ground that there was a sufficient effect on United States commerce. Subsequently, the defendant's registration was canceled in Mexican proceedings, and on review of the Fifth Circuit's decision, the Supreme Court noted that the question of the effect of a valid registration in the foreign country was not before it. The Court affirmed the Fifth Circuit, holding that the federal district court had jurisdiction to prevent unfair use of the plaintiff's mark in Mexico. In doing so the Court stressed three factors: (1) the defendant's conduct had a substantial

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[[1] See *Annual Digest*, 1927–1928, Case No. 117.]

[2] " The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commence [*sic*] from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; *and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations.*" 15 U.S.C.A. § 1127. [Emphasis added.]

effect on United States commerce; (2) the defendant was a United States citizen and the United States has a broad power to regulate the conduct of its citizens in foreign countries; and (3) there was no conflict with trade-mark rights established under the foreign law, since the defendant's Mexican registration had been canceled by proceedings in Mexico. Only the first factor is present in this case.

" We do not think that the *Bulova* case lends support to plaintiff; to the contrary, we think that the rationale of the Court was so thoroughly based on the power of the United States to govern ' the conduct of *its own citizens* upon the high seas or even in foreign countries *when the rights of other nations or their nationals are not infringed* ',[1] that the absence of one of the above factors might well be determinative and that the absence of both is certainly fatal.[2] Plaintiff makes some argument that many American citizens are employed in defendant's New York Office, but it is abundantly clear that these employees do not direct the affairs of the company or in any way control its actions. The officers and directors of defendant who manage its affairs are Canadian citizens. Moreover, the action has only been brought against Canadian citizens. We conclude that the remedies provided by the Lanham Act, other than in § 44, should not be given an extraterritorial application against foreign citizens acting under presumably valid trade-marks in a foreign country.

" B. *Section* 44 *of the Lanham Act.*—Plaintiff's alternative contention is that § 44 of the Lanham Act, which is entitled ' International Conventions,' affords to United States citizens all possible remedies against unfair competition by foreigners who are nationals of convention countries, including the relief requested in this case. Subsection (b) of § 44 specifies that nationals of foreign countries signatory to certain named conventions (including the Paris Union signed by Canada) are ' entitled to the benefits . . . [of the Act] to the extent . . . essential to give effect to [the conventions].' Subsection (g) then provides that the trade names of persons described in subsection (b), i.e., nationals of foreign countries which have signed the conventions, ' shall be protected without the obligation of filing or registration whether or not they form parts of marks ', and subsection (h) provides that the same persons ' shall be entitled to effective protection against unfair competition . . .' Finally, subsection (i) provides that ' citizens or residents of the United States shall have the same benefits as are granted by this section to persons described in subsection (b) . . .' Thus § 44 first implements the international agreements by providing certain foreign nationals with the benefits contained in those agreements, then, in subsection (i), places American citizens on an equal footing by providing them with the same benefits. See *American Auto. Ass'n* v. *Spiegel*, 2 Cir., 1953, 205 F.2d 771; *L'Aiglon Apparel* v. *Lana Lobell, Inc.*, 3 Cir., 1954, 214 F.2d 649. Since American citizens are given only the same benefits granted to eligible foreign nationals, the benefits conferred on foreign nationals must be examined to see whether they have any extraterritorial application.

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[1] 344 U.S. 280, 285, 286, 73 S.Ct. 252, 255. [Emphasis added.] The following quotations from the opinion of the Court indicate the importance to the decision of the two factors referred to:

" . . . Congress in prescribing standards of conduct *for American citizens* may project the impact of its laws beyond the territorial boundaries of the United States." 344 U.S. at page 282, 73 S.Ct. at page 254.

" . . . ' Congress has the power to prevent unfair trade practices in foreign commerce *by citizens of the United States*, although some of the acts are done outside the territorial limits of the United States ' " 344 U.S. at page 286, 73 S.Ct. at page 255.

" . . . Mexico's courts have nullified the Mexican registration of ' Bulova '; there is thus no conflict which might afford petitioner a pretext that such relief would impugn foreign law. The question, therefore, whether a valid foreign registration would affect either the power to enjoin or the propriety of its exercise is not before us. Where, as here, *there can be no interference with the sovereignty of another nation*, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction. . . ." 344 U.S. at page 289, 73 S.Ct. at page 257.

[2] At the time the Fifth Circuit decided the *Bulova* case, 194 F.2d 567, the defendant's Mexican registration had not been canceled. Since the Fifth Circuit assumed that the defendant had a valid Mexican registration, it thought the presence or absence of a foreign trade-mark was not a determinative factor. *Cf. George W. Luft Co.* v. *Zande Cosmetic Co.*, 2 Cir., 1944, 142 F.2d 536. We need not decide that question because of the additional fact that the defendant here is not an American citizen.

" The benefits provided by § 44 (without attempting to be exhaustive) may be summarized as follows:[1] a foreign national may register his foreign mark upon the production of a certificate of registration issued by his country of origin, even though he has not used his mark in United States Commerce, § 44 (c), 15 U.S.C.A. § 1126 (c); in determining priority of filing, if the foreign national has filed for registration in the United States within six months after filing abroad, he may make use of his foreign filing date but if his foreign registration antedates the six month period, he may use only his United States filing date, § 44 (d), 15 U.S.C.A. § 1126 (d); a foreign national may register his foreign mark on the Principal Register if they are eligible, and, if not, on the Supplemental Register, § 44 (e), 15 U.S.C.A. § 1126 (e); a foreign national may prevent the importation into the United States of goods bearing infringing marks or names, § 42, 15 U.S.C.A. § 1124; once a foreign mark has been registered under the Lanham Act, its status in the United States is independent of the continued validity of its registration abroad, and its duration, validity, and transfer in the United States are governed by ' the provisions of this chapter ', § 44 (f), 15 U.S.C.A. § 1126 (f). It will be noted that all of these benefits are internal to the United States in the sense that they confer on foreign nationals certain rights in the United States. None of them could have extraterritorial application, for all of them relate solely to the registration and protection of marks within the United States.

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[1] See Ladas, The Lanham Act and International Trade, 14 *Law and Contemp. Problems* 269 (1949); 4 Callmann, *Unfair Competition and Trade-Marks* § 99.2 (a) (2d ed., 1950).

" We now come to the two remaining benefits specified in § 44, and the ones upon which plaintiff relies: the provision in subsection (g) protecting trade-names without the obligation of filing or registration, and the provision in subsection (h) entitling eligible foreign nationals 'to effective protection against unfair competition' and making available 'the remedies provided in this chapter for infringement of marks . . . so far as they may be appropriate in repressing acts of unfair competition.' Here again, we think that these benefits are limited in application to within the United States. It is true that they are not expressly so limited, but it seems inconceivable that Congress meant by this language to extend to all eligible foreign nationals a remedy *in the United States against unfair competition occurring in their own countries*. Moreover, if § 44 were so interpreted, it would apply to commerce which is beyond the Congressional power to regulate, and a serious constitutional question would be created. In the absence of any Congressional intent to provide remedies of such extensive application, we interpret § 44 in a manner which avoids constitutional questions and which carries out the underlying principle of the International Conventions sought to be implemented by § 44—the principle that each nation shall apply its national law equally to foreigners and citizens alike.

" Since United States citizens are given by subsection (i) of § 44 only the same benefits which the Act extends to eligible foreign nationals, and since the benefits conferred on those foreign nationals have no extraterritorial application, the benefits accorded to citizens by this section can likewise have no extraterritorial application.[1]"

" III. *Forum Non Conveniens*

" With respect to the trade-mark infringement and unfair competition alleged to have occurred within Canada, the complaint, as we have seen, does not state a claim arising under the laws of the United States. Therefore, the jurisdiction of the district court over this part of the action rests solely on diversity of citizenship.[1] Plaintiff contends that actions for unfair competition are transitory, and that the district court was required to exercise its jurisdiction over the action, even though the passing off occurred outside of the United States, because plaintiff is an American citizen and personal jurisdiction over defendant can be obtained within the United States only in the Southern District of New York. We think, however, that the district court did not abuse its discretion in declining to exercise its jurisdiction over that portion of the case arising in Canada and governed by Canadian trade-mark law.

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[1] The fact that United States citizens have already been given benefits by other provisions of the Lanham Act similar or identical to those contained in § 44 should not obscure the fact that subsection (i) added certain rights which United States citizens would not otherwise have had. For example, citizens or residents of the United States who have a " bona fide and effective business or commercial establishment " in a foreign country, within the meaning of subsection (b), may register any trade-marks which they have registered in that foreign country in the same manner as that provided for foreign nationals and with the same filing priorities. Thus § 44 (i) has meaning independent of its possible significance as a source of a substantive federal law of unfair competition. See *Stauffer* v. *Exley*, 9 Cir., 1950, 184 F.2d 962, and *Pagliero* v. *Wallace China Co.*, 9 Cir., 1952, 198 F.2d 339, where the Ninth Circuit held that § 44 (i) created a substantive federal law of unfair competition wherever interstate commerce is involved, and hence that federal district courts have federal-question jurisdiction over all claims of unfair competition brought by those engaged in interstate commerce. In *American Auto. Ass'n* v. *Spiegel*, 2 Cir., 1953, 205 F.2d 771, we held to the contrary; and the Third Circuit has since come to the same conclusion, *L'Aiglon Apparel* v. *Lana Lobell, Inc.*, 3 Cur., 1954, 214 F.2d 649. The Supreme Court has not yet passed on the question.

" The doctrine of *forum non conveniens* is now firmly established in federal law. *Koster* v. *Lumbermen's Mut. Casualty Co.*, 1947, 330 U.S. 518, 67 S. Ct. 828, 91 L.Ed. 1067; *Gulf Oil Corporation* v. *Gilbert*, 1947, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055, 28 U.S.C. § 1404 (a) has, in effect, codified and replaced this doctrine whenever the more convenient tribunal is a United States district court where the action ' might have been brought.' *Norwood* v. *Kirkpatrick*, 1955, 349 U.S. 29, 75 S.Ct. 544, 547, 99 L.Ed. 789. But the federal courts retain the inherent power to refuse jurisdiction of cases not within § 1404 (a)—cases which should have been brought in a foreign jurisdiction, rather than in the United States. *De Sairigne* v. *Gould*, 2 Cir., 1949, 177 F.2d 515, affirming D.C., 83 F.Supp. 270, *certiorari* denied 339 U.S. 912, 70 S.Ct. 571, 94 L.Ed. 1338; *Latimer* v. *S/A Industrias Reunidas F. Matarazzo*, D.C.S.D.N.Y. 1950, 91 F. Supp. 469. Whether jurisdiction should be declined is determined by balancing conveniences, but the plaintiff's choice of forum will not be disturbed unless the balance is strongly in favor of the defendant. See *Gulf Oil Corporation* v. *Gilbert*, *supra*, 330 U.S. at pages 504–509, 67 S.Ct. at pages 840, 843. Finally, in the determination of a motion to dismiss for *forum non conveniens*, the court may consider affidavits submitted by the moving and opposing parties. *Koster* v. *Lumbermen's Mut. Casualty Co.*, *supra*, 330 U.S. at page 531, 67 S.Ct. at page 835.

" An American citizen does not have an absolute right under all circumstances to sue in an American court. *De Sairigne* v. *Gould*, *supra*; *United States M. & S. Ins. Co.* v. *A/S Den Norske O.G. Australie Line*, 2 Cir., 1933, 65 F.2d 392; *Wheeler* v. *Société Nationale des Chemins, etc.*, D.C.S.D.N.Y.1952, 108 F.Supp. 652. However, where, as here, application of the doctrine of *forum non conveniens* would force an American citizen to seek redress in a foreign court, courts of the United States are reluctant to apply the doctrine. *Burt*

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[1] In a diversity action brought to enforce state-created rights, we must apply the law of New York, including its conflict-of-laws rules. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 1941, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477. New York follows the almost universal rule that the law governing a tort is the law of the place where the alleged wrong occurred. See *Conklin* v. *Canadian-Colonial Airways, Inc.*, 1935, 266 N.Y. 244, 248, 194 N.E. 692, 694; *Loucks* v. *Standard Oil Co.*, 1918, 224 N.Y. 99, 120 N.E. 198; *Whitford* v. *Panama R. Co.*, 1861, 23 N.Y. 465, 466. Consequently, Canadian law governs the unfair competition occurring in Canada.

v. *Isthmus Development Co.*, 5 Cir., 1955, 218 F.2d 353; *The Saudades*, D.C.E.D.Pa.1946, 67 F.Supp. 820; *cf. Swift & Co., Packers* v. *Compania Columbiana Del Caribe S/A*, 1950, 339 U.S. 684, 697, 70 S.Ct. 861, 94 L.Ed. 1206.

" We are convinced that the balance of convenience is strongly in favor of defendant,[1] but it is unnecessary for the following reasons for us to rely solely on that ground.

" The crucial issue in this case is the validity of defendant's Canadian trade-mark registration under Canadian trade-mark law. The Canadian Registrar of Trade-Marks has registered the mark ' Vanity Fair ' in defendant's name and has refused registration of plaintiff's ' Vanity Fair ' mark on the ground that it interfered with defendant's prior registration. Sections 6 and 19 of the Canadian Trade-Mark Act of 1952 give the Canadian registrant of a trade-mark the statutory right to prevent the use in Canada of a confusing mark, unless the Canadian registration is shown to be invalid. Such a showing could be made in any Canadian court of competent jurisdiction as a defense to an infringement action brought by defendant or plaintiff could initiate proceedings in the Exchequer Court of Canada to expunge or amend defendant's registration. §§ 18 and 56. The Exchequer Court is given exclusive jurisdiction by § 56 to expunge or amend a trade-mark registration. Under these circumstances, we do not think a United States district court should take jurisdiction over that portion of this action turning on the validity or invalidity of defendant's Canadian trade-mark.

" In the first place, courts of one state are reluctant to impose liability upon a person who acts pursuant to a privilege conferred by the law of the place where the acts occurred. Restatement, *Conflict of Laws* § 382 (2); Goodrich, *Conflict of Laws* § 94 (1939). In the second place, it is well-established that the courts of one state will not determine the validity of the acts of a foreign sovereign done within its borders. *Underhill* v. *Hernandez*, 1897, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456; *American Banana Co.* v. *United Fruit Co.*, 1909, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826; *Ricaud* v. *American Metal Co.*, 1918, 246 U.S. 304, 38 S.Ct. 312, 62 L.Ed. 733; *Banco de*

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[1] When the " practical problems that make trial of a case easy, expeditious, and inexpensive ", *Gulf Oil Corporation* v. *Gilbert*, 1946, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055, are considered, the Southern District of New York is seen to be an inconvenient forum. Some evidence from American sources would be required, such as proof of plaintiff's American advertising spilling over into Canada. But most of the issues of fact, such as defendant's and plaintiff's respective use of the trade-mark " Vanity Fair " in Canada; defendant's non-use of the trade-mark for a period of years; defendant's resumption of use in 1953, etc., are issues on which the witnesses and proof would be more readily available in Canada. If it be thought that dismissal is too harsh a disposition of a case such as this, it should be remembered that the trial court has power to dismiss on condition that the defendant stipulate to waive the statute of limitations *pro tanto*. The courts of other countries will ordinarily recognize such a stipulation, and the plaintiff is thus assured of a remedy elsewhere.

Espana v. *Federal Reserve Bank*, 2 Cir., 1940, 114 F.2d 438;[1] *Bernstein* v. *Van Heyghen Frères Société Anonyme*, 2 Cir., 1947, 163 F.2d 246, *certiorari* denied 332 U.S. 772, 68 S.Ct. 88, 92 L.Ed. 357;[2] *Pasos* v. *Pan American Airways*, 2 Cir., 1956, 229 F.2d 271 [reported *supra*, p. 27, in this volume.] These precedents have not involved the acts of trade-mark officials of foreign countries, but their rationale would appear to extend to that situation. Moreover, in *George W. Luft* v. *Zande Cosmetic Co.*, 2 Cir., 1944, 142 F.2d 536, *certiorari* denied 323 U.S. 756, 65 S.Ct. 90, 89 L.Ed. 606, we assumed the validity of foreign trade-mark registrations in holding that the lower court could not enjoin an American manufacturer from labeling his product with an infringing mark in the United States for shipment to foreign countries in which he had a presumably valid registered trade mark. ' We do not see upon what " principles of equity " a court can enjoin the initiation of acts in the United States which constitute no wrong to the plaintiff in the country where they are to be consummated. Nor can we perceive upon what theory a plaintiff can recover damages for acts in the United States resulting in a sale of merchandise in a foreign country under a mark to which the defendant has established, over the plaintiff's opposition, a legal right of use in that country. Consequently neither the injunction nor the accounting should cover activities of the defendants, either here or abroad, concerned with sales in countries where the defendants have established rights superior to the plaintiff's in the name " Zande ".' 142 F.2d at page 540.

" Were this merely a transitory tort action in which disputed facts could be litigated as conveniently here as in Canada, we would think the jurisdiction of the district court should be exercised. But we do not think it the province of United States district courts to determine the validity of trade-marks which officials of foreign countries have seen fit to grant. To do so would be to welcome conflicts with the administrative and judicial officers of the Dominion of Canada. We realize that a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere.[3] But this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country.[4]

[[1] *Annual Digest*, 1940, Case No. 6.]

[[2] *Ibid.*, 1947, Case No. 5.]

[3] *State of New Jersey* v. *City of New York*, 1931, 283 U.S. 473, 51 S.Ct. 519, 75 L.Ed. 1176; *Massie* v. *Watts*, 1810, 6 Cranch. 148, 3 L.Ed. 181; *The Salton Sea Cases*, 9 Cir., 1909, 192 F. 792; *Kroese* v. *General Steel Castings Corporation*, 3 Cir., 1950, 179 F.2d 760, 15 A.L.R.2d 1117.

[4] The character of the potential difficulties is illustrated by *United States* v. *Imperial Chemical Industries*, D.C.S.D.N.Y. 1952, 105 F.Supp. 215, and *British Nylon Spinners* v. *Imperial Chemical Industries* [1953], 1 Ch. 19 [*International Law Reports*, 1952, Case No. 36], in which a United States court directed a British

"The district court, therefore, did not abuse its discretion in refusing to entertain the claims of trade-mark infringement and unfair competition occurring in Canada. Were it not for the fact that plaintiff did not press its American claims, and they appear to be of somewhat minor significance, we would think it improper to dismiss the entire complaint, since we think that the claims of trade-mark infringement and unfair competition occurring in the United States can be clearly ascertained from the complaint.[1] However, under the circumstances, we will affirm the dismissal, but allow plaintiff, if it so desires, to file an amended complaint within thirty days from date of our mandate herein, stating separately the American issues."

[Reports: 234 F.2d 633; *certiorari* denied, 352 U.S. 871, 1 L.Ed. 2d 76, 77 Sup. Ct. 96 (1956).]

NOTE.—The foregoing case is noted in *Harvard Law Review*, 70 (1957), p. 743; *Mercer Law Review*, 8 (1956), p. 221; *Michigan Law Review*, 55 (1957), p. 887; *Syracuse Law Review*, 8 (1956), p. 111; and *Wayne Law Review*, 3 (1957), p. 156.

Jurisdiction—Territorial—Limits of—Offence Begun on High Seas and Continued within Territorial Sea and National Waters —Stowing Away—By Foreign National—Jurisdiction over Entering Stowaway.

UNITED STATES *v.* MENERE *ET AL.*

United States, District Court, Southern District, New York.

October 23, 1956.

THE FACTS.—Graham, a British subject, stowed away aboard the S.S. *Queen Elizabeth* at Southampton with the aid of Menere, a member of the crew. During the voyage and while the ship was in the mid-Atlantic, some 1,700 miles from New York, Graham was apprehended. When the *Queen Elizabeth* arrived in New York, he admitted to the immigration authorities of the United States that he had boarded the vessel without paying for his passage with

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corporation to grant immunity under certain patents in Great Britain, and an English court enjoined it from taking that action. The tenderness of Canadian authorities concerning what they consider foreign interference with their domestic concerns is illustrated by the prompt Canadian legislation which followed attempts by United States courts to subpoena records of Canadian companies for use in a Sherman Act, 15 U.S.C.A. §§ 1–7, 15 note, investigation. . . .

[1] The claims of trade-mark infringement and unfair competition in the United States are predicated upon the following circumstances: (1) defendant's advertising of feminine underwear in the United States under the trade-mark "Vanity Fair" which results from the American circulation of Canadian media of communication; and (2) defendant's mail order sales of femine underwear into the United States under the trade-mark "Vanity Fair." The issues raised by these allegations are clear and narrow.

the intention of disembarking in the United States. Graham was indicted for a violation of 18 U.S.C. § 2199, dealing with stowing-away, the text of which is set forth in the body of the opinion. At the conclusion of the trial, Graham moved for acquittal on the ground of lack of jurisdiction. He maintained that since he was apprehended by the ship's officers before the vessel arrived in the United States, his act of stowing-away had not been committed within the territorial limits of the United States.

Held: that the defendant's motion to dismiss the indictment must be denied and the defendant found guilty. The offence defined by the laws of the United States was committed when the defendant arrived within the jurisdiction of the United States. The fact that a stowaway is apprehended at sea does not alter his status as a stowaway.

The Court said: " The statute under which the indictment was filed is Title 18 U.S.C.A. § 2199, a portion of which is as follows:

> ' Whoever, without the consent of the owner, charterer, master or person in command of any vessel, or aircraft, with intent to obtain transportation, boards, enters or secretes himself aboard such vessel or aircraft and is thereon at the time of departure of said vessel or aircraft from a port, harbor, wharf, airport or other place within the jurisdiction of the United States; or
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> ' Whoever, with like intent, having boarded, entered or secreted himself aboard a vessel or aircraft at any place within or *without the jurisdiction* of the United States, remains aboard after the vessel or aircraft has left such place and is *thereon at any place within the jurisdiction of the United States* . . . [Emphasis added.]
>
> ' Shall be fined not more than $1,000 or imprisoned not more than one year, or both.'

" It is undisputed that the defendant, without the consent of the vessel's owner and with the intent to obtain transportation, boarded the S. S. *Queen Elizabeth* and secreted himself aboard it, although without the jurisdiction of the United States. It is also undisputed that he remained aboard after the vessel left the City of Southampton, England, bound for Cherbourg, France, and then for New York. It is conceded that the defendant was on board the ship when it docked in the Port of New York within the jurisdiction of the United States. Therefore, the defendant's contention with respect to lack of jurisdiction is not well-founded since the facts in this case are squarely within the terms of the second paragraph of the statute above set forth. See *United States* v. *Russo*, 2 Cir., 1949, 172 F.2d 553.

" The second paragraph of Section 2199, Title 18 U.S.C.A., was violated by the defendant when he arrived aboard the S. S. *Queen Elizabeth* within the jurisdiction of the United States.

' [A] person may be charged in the place where the evil results, though he is beyond the jurisdiction when he starts the train of events of which that evil is the fruit.' *United States* v. *Steinberg*, 2 Cir., 1932, 62 F.2d 77, 78 *certiorari* denied 289 U.S. 729, 53 S.Ct. 526, 77 L.Ed. 1478.[1] See also *Ramey* v. *United States*, 5 Cir., 1956, 230 F.2d 171.

"Defendant cites *United States* v. *Baker*, D.C.S.D.N.Y.1955, 136 F.Supp. 546[2] and *Yenkichi Ito* v. *United States*, 9 Cir., 1933, 64 F.2d 73 *certiorari* denied 1933, 289 U.S. 762, 53 S.Ct. 796, 77 L.Ed. 1505[3] as authority for his position. In the *Baker* case, an alien was indicted for falsifying and concealing a material matter within the jurisdiction of the Immigration and Naturalization Service at a time when said alien was present in Canada. The indictment was dismissed on the ground that the United States has no power to indict and try an alien for a crime committed abroad. The Court noted that 'the defendant's crime was complete the moment she made the false statement; no further acts within the United States were necessary'. 136 F.Supp. at pages 548–549. In the *Yenkichi Ito* case, *supra*, a federal statute prohibiting the bringing of aliens into the United States was held not to have been violated because the aliens were some forty miles off the coast of Southern California when their vessel was seized by the authorities. The Court said: 'The act committed was legal where committed and was potentially wrong only because coupled with an intent to consummate the act of landing the aliens within the United States.' 64 F.2d at page 75. Hence, the defendants were not guilty of the substantive offense since they had not landed the aliens on the mainland.

"In the case at bar the crime was consummated when the defendant arrived 'within the jurisdiction of the United States.' His presence in New York was the nexus for jurisdictional purposes. The mere fact that the defendant was apprehended while at sea does not of itself alter his status as a stowaway, see *United States* v. *Sandrey C.C.*, 48 F. 550; *Stone ex rel. Colonna* v. *Tillinghast*, 1 Cir., 1929, 32 F.2d 447; *The Manuel Arnus*, 2 Cir., 1935, 75 F.2d 943, *certiorari* denied 295 U.S. 756, 55 S.Ct. 913, 79 L.Ed. 1699; nor does it deprive the Court of jurisdiction to entertain this action. The statute applies with equal force to stowaways who are discovered as well as to those who are more resourceful."

[Report: 145 F. Supp. 88.]

Jurisdiction—Territorial—Protection of Industrial Property—Infringement of Trade-Mark and Trade Name and Unfair Competition in Foreign State—Registration by Infringer of Trade Mark in Foreign State—Impact of Foreign Infringement within Territory of State Concerned—Authority of State to Regulate Conduct of Nationals and Aliens Abroad—The Law of the United States of America.

See p. 276 (*Ramirez & Feraud Chili Co.* v. *Las Palmas Food Co., Inc., et Al.*).

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[1] Noted in *Annual Digest*, 1919–1942, Case No. 59.]

[2] See *International Law Reports*, 1955, p. 203.]

[3] See *Annual Digest*, 1933–1934, Case No. 82.]

Jurisdiction—Territorial Limits of—Foreign Confiscatory Legislation—Netherlands Decree Confiscating German Property for Purpose of Reparation—Claim for Return of Property—Paris Agreement of October 23, 1954, on Settlement of Matters Arising out of the Occupation of Germany.

See p. 21 (*AKU Case*).

Jurisdiction—Territorial Limits of—Nationalization of Company Incorporated Abroad—Whether Action on Behalf of Nationalized Company Admissible in Country of Forum—The Law of France.

See p. 19 (*Ilitch* v. *Banque Franco-Serbe*).

ii.—Criminal and Other Jurisdiction over Foreigners

Jurisdiction—Territorial—Criminal Jurisdiction over Foreigners—Crimes Committed Against Nationals—Relevance of Place Where Crime Committed—The Law of Mexico.

Re SMITH.

Mexico, Supreme Court. February 6, 1956.

THE FACTS.—The accused, a national of the United States of America, purchased in New York City an automobile to be delivered to the complainant in Puebla, Mexico, and in order to facilitate its passage from the United States to Mexico she had the documents made out in her own name. The documents were to be endorsed or transferred in Mexico to the complainant, the true purchaser. Subsequently, the accused refused to make the endorsement or the transfer. On these facts, a conflict of jurisdiction arose between the local State Court of Puebla and the District Court of the Federal Judiciary. The Penal Code of the Federal District and Territories lays down in Article 1 that its provisions shall apply to crimes committed in the District and Territories, which would come under the jurisdiction of the local courts, and to crimes of a national character, which would be tried by the Federal Judiciary. Article 2 provides that Federal jurisdiction includes crimes " initiated, prepared or committed abroad when they produce or are intended to produce effects within the territory of the Republic ". Article 4 provides that crimes committed abroad—including, among others, those committed by aliens against Mexicans—shall be punishable within the Republic in accordance with Federal law, provided that (1) the accused is present in the Republic, (2) he has not been finally adjudged in the country in which he committed the crime, and (3) the offence of which he is accused constitutes a crime in the country in which it was committed as well as in Mexico.

Held (unanimously) on the point of conflict of jurisdiction: that the local courts of Puebla had jurisdiction. The act which constitutes the offence with which the accused was charged had been committed in Mexico and not abroad.

The Court said: "The criminal act in this case consists of taking possession of another person's property illegally, either through fraud or by taking advantage of an error. Although it is conceivable that the accused, while still in New York, may have considered the commission of this fraudulent taking, which might be regarded as an act of preparation, yet it could not be definitely established that the crime occurred at that moment; the act of fraud consisted rather in the refusal to make the endorsement or transfer of the documents while in Puebla. Therefore, it cannot be said that the offence was committed abroad by an alien against a Mexican, and hence it falls not within the jurisdiction of the Federal court but within that of the State court."

[Reports: *Boletin de Información Judicial,* Año I, No. 109, September 3, 1956, p. 542.]

NOTE.—*Cf. Re Ledbetter*, decided by the Supreme Court of Mexico on February 9, 1955, where the accused was charged with having contracted a second marriage in the United States of America only four days after having been divorced in Sonora, Mexico, thus violating the prohibition in the judicial decree against remarriage for one year. The accused returned to live in Sonora with her second husband. On the question of the conflict of jurisdiction between the local Court of Sonora and the federal District Court, it was *held* that the crime of disobedience to the prohibition in the divorce decree was committed in the United States at the time of the second marriage, hence the Federal Court was the competent tribunal. [*Boletin de Información Judicial,* Año XI, No. 101 (*January* 2, 1956), p. 11.]

iii.—Over Ports and National Waters

[*See also* PART III, STATE TERRITORY: B, III, Territorial Waters.]

Jurisdiction—Territorial—Over Ports and National Waters—Entry in Distress—Passenger on Aircraft Required to Land on Account of Weather—Failure to Declare Goods Carried on Person—No Exemption from National Law—The Law of the United States of America.

LEISER *v.* UNITED STATES.

United States, Court of Appeals, First Circuit. June 13, 1956.

THE FACTS.—This was a libel proceeding against certain cut and polished diamonds, alleged by the United States to have been brought into that country by Leiser without having been declared, in violation of the laws of the United States. Leiser, with the diamonds in his possession, was travelling by air from Frankfurt, Germany, to Gander, Newfoundland, by way of Paris, his ultimate destination being Bermuda. His tickets called for no stop in the United States, but as the result of adverse weather conditions the plane on which he was travelling was forced to land at Boston, Massachusetts, U.S.A. Before any customs officer approached him in Boston, he made arrangements to return to Canada by the next available plane, which was to leave within a few hours. Leiser failed to declare the diamonds in his possession. Subsequent discovery of the diamonds by a customs officer led to the prosecution of Leiser for smuggling and for fraudulent entry of goods into the United States without declaration thereof. Leiser was tried and acquitted on both charges. The United States thereafter instituted libel proceedings against the diamonds in question. The United States District Court for the District of Massachusetts allowed the motion of the United States for summary judgment, and Leiser appealed. He contended that goods involuntarily brought into the United States by wreck, distress of weather, or *vis major* were exempt from the customs and other local laws of the United States.

Held: that the judgment of the Court below must be affirmed. The exemption from the requirements of the customs laws of the United States accorded merchandise brought into that country as cargo aboard vessels entering in distress and with no intent that they be unladen had no application to goods carried on the person of individuals involuntarily arriving by air.

The Court said: " Title 19 U.S.C.A. § 1498 provides that:

> ' (a) The Secretary of the Treasury is authorized to prescribe rules and regulations for the declaration and entry of—
>
> ' (6) Articles carried on the person or contained in the baggage of a person arriving in the United States; . . .'

Title 19 U.S.C.A. § 1624 provides that:

> ' In addition to the specific powers conferred by this title, the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this title.'

" Pursuant to the authority conferred in the aforementioned sections, the Secretary prescribed by regulation, set forth in 19 C.F.R. § 10.19: ' *Declaration and entry*—(a) *Declaration required.* All articles brought into the United States by any individual shall be declared to a customs officer. . . .'

" Congress has further provided in Title 19 U.S.C.A. § 1496:

> ' *Examination of baggage*
>
> ' The collector may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefor has been made.'

> '§ 1497. *Same; penalties*
>
> 'Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.'

"As we understand appellant's argument, he contends that the word 'arriving' as it appears in §§ 1496 and 1498 is to be construed in a limited technical sense, under the authority of various cases involving ships which he has cited, as meaning not mere physical arrival but rather 'a voluntary or intentional arrival of such goods "with intent to unlade" same . . .' in the United States. We cannot agree with this contention.

"The structure of the customs laws and regulations reflects a distinction in the requirements applicable to merchandise brought into the country as ship's cargo, on the one hand, and items carried on the person or in baggage on the other. We are not convinced that any and all exemptions which may be accorded to ships in distress must of necessity be likewise granted to individuals arriving involuntarily by air. Moreover if it had been the intent of Congress to extend similar exemptions to such individuals, we believe it would not have been done inferentially by relying upon some highly technical interpretation of an ordinary word such as 'arriving', but, on the contrary, would have been spelled out in some detail as was done in § 1441 (4) relating in part to vessels arriving in distress. An examination of this section reveals that it is not every vessel arriving involuntarily which is exempt from an obligation to make entry at the customhouse, but only those '. . . which shall depart within twenty-four hours after arrival without having landed or taken on board any passengers, or any merchandise other than bunker coal, bunker oil, sea stores, or ship's stores . . .' We can think of no reason why Congress would wish to grant a much more generous blanket exemption in the case of persons arriving involuntarily by air. On the contrary, the necessity of qualifying and circumscribing any such exemption would appear to be equally imperative.

"We believe the word 'arriving' as it appears in relevant sections of the statute does not bear the construction for which appellant contends. We believe that § 1497 subjected to forfeiture the diamonds which appellant failed to declare regardless of the fact that he came into this country involuntarily and with no 'intent to unlade.'

[Reports: 234 F.2d 648; *certiorari* denied, 352 U.S. 893, 1 L.Ed. 2d 87, 77 Sup. Ct. 133 (1956).]

Jurisdiction—Territorial—Over Ports and National Waters—Detention of Foreign Vessels—In Time of War—For Purpose of Investigating Officers and Crews—Denial of Bunker and Export Cargo Licences.

See p. 354 (*J. A. Zachariassen & Co. et Al.* v. *United States*).

iv.—At the Maritime Frontier. Hovering Laws

[*See also below*, C, High Seas.]

Jurisdiction—At the Maritime Frontier—Right Under International Law to Extend Jurisdiction Beyond Low-Water Mark—Necessity for Municipal Legislation—The Law of Canada.

GAVIN *ET AL.* *v.* THE QUEEN.

Canada, Supreme Court of Prince Edward Island. March 16, 1956.

(Campbell C.J.; MacGuigan and Tweedy JJ.)

THE FACTS.—Seventeen fishermen were convicted by Hinton Stipendiary Magistrates for contravening s. 7 (*b*) of the Lobster Fishery Regulations for the Maritime Provinces of Quebec, and four canners were convicted for contravening s. 15 of the same Regulations. The Regulations imposed restrictions on the time and size of the lobster catch in certain areas of the Gulf of St. Lawrence opposite Nova Scotia, New Brunswick and Prince Edward Island. Appeals were made against all twenty-one convictions, one[1] of the grounds of appeal relied upon by the appellants being:

" 1. (1) Apart from statute the realm of England, and of Canada, extends but to the shore. Any 3-mile or other limit must, in accordance with International Law, be fixed by statute or Treaty and not by Regulation, and the [*Fisheries*] *Act* [R.S.C. 1952, c. 119] is silent in this regard . . .

" (2) Sec. 7 (*b*) of the Regulations is consequently *ultra vires*."

Held: that the convictions of the seventeen fishermen, but not of the four canners, must be quashed. The extension of the territorial jurisdiction of a State beyond low-water mark, which international law permits for certain purposes and with certain restrictions, must be enacted by a competent Legislature; s. 7 (*b*) of the Regulations does not adequately define the area to which it applies, and so does not constitute a sufficient legislative extension of territorial jurisdiction.

Campbell C.J., after considering various points of municipal law, said: " The most important and most far-reaching ground of appeal is that numbered 1, and subdivided into paras. (1) and (2). There does not appear to be any judicial authority to dispute the appellants' submission that extension of the territorial jurisdiction of a realm beyond its low-water mark cannot rest upon common law alone, but must be enacted by a competent Legislature. The principle laid down to that effect by Lord Cockburn C.J. and a number of the other Judges in *R.* v. *Keyn,* (1876), 2 Ex. D. 63, seems to have become the accepted law on the subject. The realm of Canada, as that of England, extends by common law to low-water mark, and all beyond is the high seas.

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[1] The other grounds of appeal were concerned with points of municipal law.

"Despite the entry of Newfoundland into Confederation, and the consequent practical surrounding of the Gulf of St. Lawrence by Canadian lands, I take it to be conceded by the respondent that the Gulf is still an external sea, and is not a bay, gulf, or estuary which might fall within the doctrines relating to waters 'inter fauces terrae' (whether, or not, these doctrines have an application to an objection such as the present).

"In *R.* v. *Keyn*, beginning at p. 176, Lord Cockburn C.J. gives a comprehensive and scholarly analysis of the writings of international authorities on the topic of jurisdiction over littoral seas, He summarizes his analysis at p. 193, as follows: 'This unanimity of opinion that the littoral sea is, at all events for some purposes, subject to the dominion of the local state, may go far to shew that, by the concurrence of other nations, such a state may deal with these waters as subject to its legislation. But it wholly fails to shew that, in the absence of such legislation, the ordinary law of the local state will extend over the waters in question.'

"At p. 198, he says: 'The law of England knows but one of territory—that which is within the body of a county. All beyond it is the high sea, which is out of the province of English law as applicable to the shore, and to which that law cannot be extended except by legislation.'

"And at p. 207: 'It is essential to keep the two things, the power of Parliament to legislate, and the authority of our Courts, without such legislation, to apply the criminal law where it could not have been applied before, altogether distinct.'

"And at p. 239, Lush J. says: 'They [the littoral waters] are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes denoting that this belt of sea is under the exclusive dominion of the State. But the dominion is the dominion of Parliament, not the dominion of the common law. That extends no further than the limits of the realm. In the reign of Richard II the realm consisted of the land within the body of the counties. All below low-water mark was part of the high seas. At that period the three-mile radius had not been thought of. International law, which, upon this subject at least, has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament. As no such Act has been passed, it follows that what was out of the realm then is out of the realm now, and what was part of the high seas then is part of the high seas now.'

" Thus, though international law has recognised the right of states to extend their legislative jurisdiction for 3, 5, 12, or 21 miles beyond low-water mark for certain purposes and with certain restrictions, such extension can be authorized only by an Act of a competent Parliament or Legislature. The case of *Mowat* v. *McFee* (1880), 5 S.C.R. 66, cited by the respondent, merely goes to show that legislation is effective to enact that the whole of the Bay of Chaleurs is within the boundaries of the Provinces of Quebec and New Brunswick, and consequently within the Dominion of Canada: see *per* Gwynne J. at p. 79.

" As the Parliament of Canada has not directly passed any legislation fixing a relevant limit for fishing operations in the locality concerned, we must consider whether Parliament has effectively delegated its power in that respect to the Governor in Council, and, if so, whether the latter has effectively exercised such delegated powers so as to validate s. 7 (*b*).

" It cannot be disputed that Parliament had the power to delegate its legislative authority to the Governor in Council or other body of its own creation. If such delegation has taken place, the depository of the powers and authority of Parliament can exercise those powers and authority, to the extent delegated, as effectively as Parliament itself could have exercised them.

" It may, as the appellant's counsel urges, be eminently desirable that Parliament should specifically enact as much of its substantive legislation as possible, especially on points of fundamental importance, and should entrust to the other bodies only a limited discretionary authority to provide for varying details and machinery to carry them out. This, however, is a political question, and not a judicial one. As Lord FitzGerald remarked in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at p. 132, ' how far it [a Legislature] shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide '.

" The intention of Parliament in this respect has not been made so specific or clear as might be desired. But s. 34 of the Fisheries Act empowers the Governor in Council to make regulations (to have the same force and effect as if enacted by the Act itself):

> ' 34 (1) (*b*) to regulate and prevent fishing;
>
> (*e*) prescribing the time when and the manner in which fish may be fished for and caught;

'(*g*) generally as may be necessary for the proper management and regulation of the sea-coast and inland fisheries.'

" I fail to see how the power to make such Regulations could be effective, especially with regard to sea-coast fisheries, unless it contained an implied authority to make the Regulations valid beyond low-water mark. Section 34 therefore appears, by necessary intendment, to confer such a delegated authority on the Governor in Council, and the remaining question is whether, or not, that authority has in turn been validly exercised.

" As there is no general enactment, either by Parliament or in the Regulations, prescribing the limits within which s. 7 (*b*) is to be effective, we must look to the specific description, in s. 7 (*b*) itself of the area in which that section attempts to regulate fishing operations.

" After describing an exception on the general area concerned, the section proceeds to prohibit, within certain dates known as ' a close time ', the fishing for, catching, possession of lobsters, and the retaining of ' short ' lobsters, ' on and along that portion of the coast, or the waters thereof, of the Provinces of Nova Scotia, New Brunswick, and Prince Edward Island from a line drawn northwest magnetic from Stewart's Brook, Sight Point, Inverness County, Nova Scotia, southwardly, westwardly and northwardly, following the coast line to the northern boundary of New Brunswick, including the coast and waters thereof of all the islands adjacent to these portions of the coasts of the said Provinces ' (here follows the description of an area with which these cases are not concerned).

" Neither the appellants nor the respondent have been able to render the Court any adequate assistance in the unravelling of the difficulties presented by the foregoing description. If we accept one of the appellants' suggestions that the north-west magnetic line was intended to be projected to the northern boundary of New Brunswick, and so would not include Jude's Point or Tignish in this Province, we meet the difficulty that such a line would never proceed southwardly, and that the expressions ' westwardly ' and ' northwardly ' would not be appropriate.

" The fisheries officers, on the other hand, appear to have formed their notions of the area concerned rather from departmental instructions than from anything which appears upon a reading of the description of the section. It may very well be that the intention of the description was to proceed for a certain distance along the ' line drawn northwest magnetic ', so as to provide what respondent's counsel terms a border on the Nova Scotia Coast between areas 6B and 7B, and then to proceed southwardly, etc., with reference to the coast line. This, however, does not appear from the description, and even if it could be inferred there would be nothing to show how far the boundaries of the area would be located from the coast.

" It is a matter of common knowledge that the Department of Fisheries enforces a ' close time ' (being the whole year with the exception of May and June) on the north, east, and a portion of the south coasts of Prince Edward Island. But the legal sanction of the ' close time ', as well as of the restrictions applied in the open season, is not based on common law but must be derived from a statute or a validly-enacted Regulation, particularly as the extension of territorial jurisdiction beyond low-water mark is involved.

" The description in s. 7 (*b*) gives no adequately clear indication of the area intended to be regulated, and neither contains nor imports any definition of the ' waters thereof ', which can be included by legislation only. The only sensible estimate which I am able to make of the description is that at some stage of its draughting a line or portion was omitted, and that omission was perpetuated by successive copyings.

" It would not be proper for the Court to supply, for such an enactment, a meaning which its words do not reasonably bear. It is true that the excepted area mentioned at the beginning of s. 7 (*b*) refers to ' a point five marine miles north magnetic from North Point Light '. That location may very well be intended as one point in the boundary of the area to be regulated by s. 7 (*b*), but there is no indication whatever that a uniform distance of 5 miles (or any other distance) from the coast was intended. And, clearly, the distance from the coast in the excepted area, which is regulated by s. 8, cannot be uniform.

" The necessity of precise legislation respecting offences committed on littoral waters is recognized by the enactment of s. 420 of the new Criminal Code. But no similar provision is contained in, or imported into, the Fisheries Act or Regulations thereunder.

" Even if, contrary to the opinions expressed by the majority Judges in *R.* v. *Keyn*, *supra*, the 3-mile limit might be validly imported from international law without the intervention of legislation, or if the expression ' coast and waters thereof ' in s. 7 (*b*) could be considered to import the 3-mile limit, it would not be adequate to include the fishing area concerned. The evidence of John C. Matthews indicates that the fishing grounds, in at least part of the locality where the offences were alleged, extends ' roughly 5 miles from the shore line '.

" A further difficulty might arise from the fact that the Fisheries Act neither enacts nor imports any provision which would extend the territorial jurisdiction of the Magistrate or Court beyond the limits of his or its county or Province. Section 420 of the Criminal Code, 1953–54, c. 51, does make such a provision, but that is not a procedural matter which is imported for the prosecution of fisheries offences. This point in itself might not prevail in the present cases, as the evidence indicates that the alleged offences continued until the appellants had entered the harbours and tied up at wharves.

Respondent's counsel properly stresses the fact that the offence is retaining and not fishing. But the 17 convictions are for retaining in a regulated area; as will later appear, the matter of retaining lobsters is normally a subject of exclusive provincial jurisdiction, and the present offence is a valid one only if it is created as properly ancillary to a validly enacted fisheries Regulation.

" Owing to the failure of the Act and of s. 7 (*b*) to describe, with anything like adequate precision, the area intended to be registered, and the absence of evidence that the offences against s. 7 (*b*) were committed in the regulated area, it is unnecessary to consider what effect, if any, would be brought to bear on the appellants' first ground, if it stood alone, by the presumed fact that the alleged offenders were Canadians operating in Canadian boats.

" I find that the places of the 17 alleged offences against s. 7 (*b*) are not shown, either by the wording of the section or by the evidence, to be within the limits of the area intended to be regulated. The 17 convictions and sentences for violation of s. 7 (*b*) of the Regulations should therefore be quashed. . . .

" I do not consider that the reasons fatal to the 17 convictions would prevail against the 4 convictions of canners. The convictions of the latter group are based on charges preferred under s. 15 of the Regulations. The offence created by that section is not dependent upon either the times or the area mentioned in s. 7 (*b*), and is therefore not invalidated by the inadequacy of delineation of that area."

(The Court went on to consider points of municipal law, and held that the four convictions of the canners should be upheld.)

[Report: (1956) 3 D.L.R. (2d) 547.]

viii.—Exemptions from and Restrictions upon Territorial Jurisdiction

(a) FOREIGN STATES

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: A, II, Sovereignty and Independence: iii, Conduct of Foreign Relations. Conclusiveness of Statements of the Executive.]

Jurisdiction—Exemptions from—Foreign States—State Corporation Formed for Trading—Whether a Corporation Having Separate Legal Personality Can Be a Department of State—Whether Entitled to Sovereign Immunity—Waiver of Immunity—Entry of Appearance and Request for Security for Costs—Ignorance of Legal Rights.

BACCUS S.R.L. *v.* SERVICIO NACIONAL DEL TRIGO.

England, Court of Appeal. October 31, 1956.

(Singleton, Jenkins and Parker L.JJ.)

THE FACTS.—The plaintiffs were a limited company formed under the laws of Italy and carrying on business there; and the defendants carried on business in Spain. On September 16, 1952, the parties entered into two c.i.f. contracts for the sale by the defendants to the plaintiffs of 26,000 tons of rye, each contract containing a term which, as translated, provided " for any divergence which may arise . . . both parties submit to the jurisdiction of the technical courts at London ".

Disputes arose and on September 9, 1954, the plaintiffs issued a writ out of the jurisdiction claiming damages for breach of contract. On October 20, 1954, an appearance was entered for the defendants by their solicitors in London. On November 19, 1955, the statement of claim was delivered, and on January 30, 1956, an order was made by consent for security for the defendant's costs in the sum of £150. On April 18, 1956, however, a summons was issued on behalf of the defendants praying that all further proceedings in the action be stayed and that the writ and statement of claim be set aside on the ground that the defendants were a department of the State of Spain and that the State through its ambassador claimed sovereign immunity. It was admitted by the defendants that they possessed a legal personality, had powers to make contracts on their own behalf for the buying and selling of wheat and could sue and be sued in their own name. It was not disputed that, apart from the possible effect of their incorporation, the defendants were a department of the Sovereign State of Spain.

Among affidavits entered for the defendants was one sworn by the Spanish Ambassador at the Court of St. James's, who deposed that the defendant " is a department of the State of Spain, being a department of the Spanish Ministry of Agriculture ". It further appeared from this affidavit that the person who was head of the defendant Company had given the instructions to their solicitors to enter an appearance and to ask for security for costs without the knowledge or authority of the Spanish Minister of Agriculture, to whom the head of the defendants was directly subordinate, and who, apart from the Cabinet or Head of the State of Spain, was the only person with authority to decide whether the defendants should submit to the jurisdiction of a foreign court. " The State of Spain ", continued the affidavit, " does not consent to these proceedings or to the continuation thereof and has never consented thereto. Such continuation would constitute a violation of the sovereign immunity of the State of Spain which I have no doubt this honourable court will not countenance."

It was argued for the plaintiffs that the defendant, being a separate juristic person, could not be entitled to State immunity; that the immunity did not in any case extend to a juristic person engaged in trade; and that even if the defendant were entitled to immunity as being part of the Spanish State, it had submitted to the jurisdiction by entering an appearance and asking for security for costs.

Held (Singleton L.J. dissenting): that the appeal must be dismissed and the decision of the Court below (*per* Pearce J.) affirmed. (1) The defendants were a department of the State of Spain notwithstanding that they were a corporate body and a separate legal entity, and they were, therefore, entitled to claim sovereign immunity. (2) There could be no submission to the jurisdiction unless it were made by a person with knowledge of the right to be waived and with the authority of the foreign sovereign, and, therefore, because the acts of the defendants in instructing solicitors to enter an appearance and ask for security for costs had been done in ignorance of his rights and without the knowledge or authority of his superiors, they did not constitute a submission to the jurisdiction.

Jenkins L.J. said: " The questions in the case are, first, whether the defendants, Servicio Nacional del Trigo, were entitled to the sovereign right of immunity from suit as a department of the Sovereign State of Spain?; and, secondly, if the defendants could otherwise claim such a right, whether they have, on the facts of this case, waived it by submitting to the jurisdiction of the court? The first question can be sub-divided into two further questions: first, are the defendants a department of the Sovereign State of Spain, or would they be such apart from the effect of their status as a corporate body?; secondly, are they disqualified from ranking as a department of the Sovereign State of Spain by reason of the fact that they are a corporate body possessing what is called in the evidence, a juristic personality, or, in other words, because they are a separate legal entity?

" As to the first part of the first question, it is not disputed that, apart from the effect of their incorporation, the defendants would be a department of the Sovereign State of Spain. The evidence which my Lord [Justice Singleton] has read in full shows, to my mind, quite clearly that the defendants were formed as a department of State. But it is said that the defendants were invested by the laws of Spain with a juristic personality or corporate status of their own, and that it is impossible for any separate legal entity such as the defendants to be a department of a Sovereign State. It is said once one reaches the conclusion that the defendants are a separate legal entity, corporation or juristic personality, then they cannot be a department of the State, but must by definition be an independent entity. That is the plaintiffs' argument on this part of the case, and they contend as a general proposition that immunity cannot be claimed on behalf of a separate legal entity engaged in trading activities, even though the government of the Sovereign State concerned is interested in those activities. The question is a difficult one, and there has as yet been no authority providing an answer to it. It arose in the *Tass* case[1] ([1949] 2 All E.R. 274) to which my Lord has referred, but for the reasons which have appeared from his judgment it was not necessary to decide the point which was reserved for future consideration. In so reserving it, Cohen L.J. said that he would not without further argument be prepared to accept the view that it necessarily followed that because a department of State was granted incorporation it was deprived thereby of the right to assert its sovereign immunity in foreign courts.

" In my view of the evidence, it is reasonably plain that while the defendants undoubtedly were constituted a juristic personality with powers resembling those of a natural person, they were only accorded that status for the purposes for which they were formed; and the purposes for which they were formed were, briefly, the importing and exporting of grain for the Spanish Government in accordance with the directions of the Spanish Ministry of Agriculture and the policy from time to time laid down by the Spanish Government. Thus it seems to me that although their status was a corporate status, their functions were wholly those of a department of State. Are we then to hold that the State of Spain is deprived of sovereign immunity with respect to this activity of importing and exporting grain by reason of the fact that the defendants are a corporate body? In my view that would be plainly wrong. In these days the Government of a Sovereign State is not as a rule reposed in one personal sovereign: it is necessarily carried out through a complicated organization which ordinarily consists of many different ministries and departments. Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an

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[[1] *Krajina* v. *The Tass Agency and Another*: see *Annual Digest*, 1949, Case No. 37.]

unincorporated body seems to me to be purely a matter of governmental machinery. If it seemed good to a foreign State—let us say Ruritania—possessed of a navy to put the affairs of the navy in the hands of a navy board—let us say, the Ruritanian Navy Board—and to enact that the members for the time being of this board should constitute a juridical person or corporation for the purposes of doing all things necessary for the maintenance and efficiency of the Ruritanian Navy, it seems to me impossible to suppose that an action brought against the Ruritanian Navy Board could be held not to infringe the sovereign immunity of Ruritania because, simply as a matter of convenience and administrative machinery, the duties appertaining to the affairs of the Ruritanian Navy had been put in the hands of an incorporated board. I appreciate that the immunity here claimed is an immunity against direct impleading, so that there is, at first sight, force in the argument that the immunity has no application whatever because the party being sued is not the Sovereign State, but is a separate legal entity or corporation which cannot in its own person claim any immunity at all. The answer to that, I think, is this, that once it is found on the evidence that the party sued is in truth a department of a Sovereign State, albeit itself a corporate body, then the suit becomes, or it becomes apparent that the suit in truth is one, between the plaintiff and the foreign Sovereign State, or the part of the foreign Sovereign State represented by the departmental body concerned. Each case must no doubt depend on its own facts, and it is not to be taken as following from what I have so far said that every corporation in which a foreign Sovereign State may be interested, whatever the nature of the activities of the corporation and whatever the nature or extent of the interest taken by the foreign Sovereign State, becomes itself a department of State.

" I think the explanation of *Ulen & Co.* v. *Polish National Economic Bank* (24 N.Y. 2d. 201[1]) is that the cases there considered were for the most part cases—as was the actual case in hand—in which the body in question had been set up for ordinary trading purposes and without the intention of constituting it a department of State. That was the view taken by Cohen L.J. when he dealt in the *Tass* case[2] ([1949] 2 All E.R. 274) with the various American authorities cited to the court, and, in particular, the case of *Ulen & Co.* v. *Polish National Economic Bank* (24 N.Y. 2d. 201).

" It is not to be assumed, however, from what I have said that a corporate body can never be a department of State in any case in which its activities can be described as trading activities. In that connexion I would refer to this passage from the judgment of Banks L.J. in *Compania Mercantil Argentina* v. *United States Shipping Board* ([1924] 93 L.J.K.B. 816; 40 T.L.R. 601), quoted in the *Tass*

[[1] See *Annual Digest*, 1938–1940, Case No. 74.]
[[2] See *supra*, p. 162, n. 1.]

case ([1949] 2 All E.R. 274, 276). Banks L.J. said (93 L.J.K.B. 816, 817):

" 'The question as to whether the vessel was or was not employed in private trading really does not arise in a case such as this where proceedings are taken *in personam,* and it is established to the satisfaction of the court that the body against whom the proceedings are taken is a body representing a Sovereign State.'

Whatever the position might be in the case of an ordinary trading company or an ordinary bank in which a foreign Sovereign State for reasons seeming good to it acquired shares, it seems to me impossible to hold that a body is disqualified from ranking as a department of State where it is an incorporated body whose operations consist of purchasing and selling or importing and exporting staple commodities in the interests of the public for whom the foreign Sovereign State is responsible. In my view, it cannot be said that the operations of the defendants in this case are comparable to ordinary private trading operations. They are operations for which responsibility has been assumed by the State, and they are being carried out by the defendants under the supervision of the State in the shape of the Spanish Ministry of Agriculture, and I think such purposes as those can properly be classed as public purposes in this connexion. Accordingly, for the reasons I have endeavoured to state, my view on the first question is that the defendants are a department of the Sovereign State of Spain, and none the less so because they have been invested with corporate powers for the purpose of enabling them to carry out their statutory functions under the supervision of the appropriate Ministry. Accordingly, in the view I take, the claim of immunity is made good subject to the question of waiver.

" My Lord [Justice Singleton] has formed the opinion that the conclusion which I have reached involves an extension of the doctrine of sovereign immunity. For my part, I cannot agree to that. The doctrine of immunity, after all, comes to no more than this, that the courts of this country will not allow a foreign sovereign to be impleaded directly, or a foreign sovereign's property to be put in jeopardy by a suit in rem. Whether a particular proceeding amounts to an impleading of a foreign sovereign within the meaning of that doctrine seems to me to be a question of fact and probably also a question of local law, in every case. Once the general principle of immunity is recognized, the fact that a particular transaction is held to fall within the rule does not make a decision to that effect an extension of the doctrine merely because occasion for its application to precisely comparable facts has never before arisen. My Lord cited some passages from the *Cristina* case ([1938] A.C. 485, 497, 518.[1]) I would like to add this citation from the speech of Lord Porter in *United States of America and Republic of France* v. *Dollfus*

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[1] See *Annual Digest,* 1938–1940, Case No. 86.]

Mieg et Cie S.A. and Bank of England ([1952] A.C. 582, 613; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572[1]):

> " 'One other point on the question of substance has been mentioned. It was suggested that immunity would only be granted where the country claiming it, in itself, granted reciprocal immunity to other nations. I can find no authority for this proposition, and in any case it was not taken either before Jenkins J. or in the Court of Appeal, and no material of fact has therefore been presented to your Lordships to enable them to deal with the argument or to ascertain whether the two governments concerned grant reciprocal immunity or not. In my view, the argument in any case is not established. The question is, what is the law of nations by which civilized nations in general are bound, not how two individual nations may treat one another.'

" Lord Porter went on to refer to Lord Maugham's observations in the *Cristina* case ([1938] A.C. 485, 519), which suggest a somewhat narrower view. But at all events, this passage from Lord Porter's speech does indicate that in his view the question was: What was the law of nations by which civilized nations in general are bound? If the point is material, I think one must assume, although there is no positive evidence of it, that the particular civilized Sovereign State of Spain considers itself bound by the general principle of sovereign immunity. That, in my view, for the present purpose suffices and it is unnecessary to go further and inquire what view would the courts of Spain take of a claim to sovereign immunity raised by some foreign sovereign in those courts and based on facts comparable to the particular facts of this case.

" As to the question of waiver, I confess that at first sight, and considering the matter apart from authority, it seemed to me that a formidable case had been made out, having regard to the fact that on instructions by Mr. Cavero, the head of the defendants, Servicio Nacional de Trigo, an unconditional appearance was entered to the writ, and, later, again on his instructions, an application was made for security for costs and an order for security was obtained. Mr. Kerr, however, referred us to two cases which (if we accept them as rightly decided, as I think we should), seems to me to conclude the matter the other way. The first of those is *The Jassy* ([1906] P. 270). I think I can give the effect of that case sufficiently by the headnote, which reads (ibid. 273):

> " 'Process by way of arrest in a damage action in rem does not lie against a vessel the property of a foreign sovereign State and destined to its public use, and, therefore, on the application of the foreign Government, and the production or a certificate from the Foreign Office as to the public character of the vessel in question, all proceedings will be stayed and no waiver of the privilege assumed, although during the temporary presence of the vessel in this country, and under a misapprehension, in order to procure her release, agents of the Government to which the

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[1] [See *International Law Reports*, 1952, Case No. 37.]

vessel belonged have given an undertaking to put in bail, and have entered an absolute appearance.'

" The President concluded his judgment by saying (ibid. 280):

" 'The result is that the principle laid down in *The Parlement Belge* (5 P.D. 197) applies, in spite of the undertaking to put in bail and appearance entered by some agent in Liverpool without the knowledge of the Roumanian Government and under a misapprehension as to the privilege enjoyed by a sovereign State in respect of the immunity of its public vessels from arrest. The action will be dismissed with costs.'

" The other authority was a decision of Astbury J. in *In re Republic of Bolivia Exploration Syndicate Ltd.* ([1914] 1 Ch. 139). That was a case under the Diplomatic Privileges Act, 1708, but as was pointed out by Mr. Kerr in argument, the Statute of Anne can be taken as declaratory of the existing law, and the degree of protection afforded to diplomatic personnel under the Act cannot be regarded as superior to the degree of protection afforded to a foreign sovereign. If anything, the protection allowed to the foreign sovereign should be more generous than that accorded to persons of inferior rank. The headnote reads ([1914] 1 Ch. 139):

" 'This diplomatic privilege can be waived, if at all, only with full knowledge of the party's right, and (semble) with the sanction of his sovereign or (if he is of inferior rank to a minister plenipotentiary) his official superior.'

Although in that case the person concerned had done acts which undoubtedly would otherwise have amounted to submission to the jurisdiction of the court, it was held that he was not bound, for he had done so in ignorance of his rights. Astbury J. said ([1914] 1 Ch. 139, 142):

" 'Even if it were conceivable that a diplomatic agent can waive his privilege, which is really the privilege of his sovereign, he can only do so intentionally, with full knowledge of his rights, and with the sanction of his sovereign or legation.'

" Applying those authorities to the present case it seems to me that the evidence here, and in particular the evidence of the ambassador, makes it reasonably plain that Mr. Cavero knew nothing about sovereign immunity, or, at all events, had no idea that by entering an appearance the defendants would be giving up any advantage or, in particular, any right to claim immunity which they might otherwise have. Furthermore, Mr. Cavero's superiors knew nothing about the matter at all until after the acts relied on as submissions to the jurisdiction had taken place. It seems to me, therefore, that what was done here was done by Mr. Cavero without the knowledge of any of his superiors, in ignorance of his rights and without actual authority inasmuch as I think the evidence shows that the authority of the Minister of Agriculture would in fact have been necessary to enable Mr. Cavero to submit to the jurisdiction.

" For the reasons I have endeavoured to state, it seems to me that the plaintiffs fail on both branches of the case and, accordingly, that this appeal should be dismissed."

Parker L.J. said: " I have also come to the conclusion that this appeal should be dismissed, and I can give my reasons briefly.

" The first question which arises is whether the body known as Servicio Nacional del Trigo is a department of the State of Spain, namely, a sub-department of the Ministry of Agriculture. If it is, then I think it is clear beyond all doubt that it is entitled to sovereign immunity, and this whatever its activities may be. Whether or not it is such a department is clearly a matter of Spanish law, and His Excellency, the Spanish Ambassador, has sworn that it is.

" [His Lordship then read the parts of the ambassador's affidavits to that effect and continued:] Although that evidence is, of course, not conclusive, it is entitled to considerable weight; and, as Tucker L.J. said in the *Tass Agency* case ([1949] 2 All E.R. 274, 281[1]):

" ' It is common ground that the onus of establishing that [the immunity] lies on [the defendants] . . . Furthermore, it is common ground that the certificate of their ambassador in this country is not conclusive of the matter, though, no doubt, it is evidence of very high evidential value, and, in a matter of this kind, I think it is probably the best kind of evidence that can be procured.'

" That, as it seems to me, is particularly true in this case when the ambassador here is not only a member of the Spanish Bar, but was also himself Minister of Agriculture from 1941 to 1945.

" How, then, do the plaintiffs seek to displace that evidence? Colas, a Spanish lawyer, has sworn two affidavits. In neither of those does he assert that this body is not a department of the State of Spain. He refers to a number of orders setting up this body and describing its functions. Valls, the legal adviser to the Spanish Embassy, has dealt with Colas's affidavits. On a reading of all the affidavits, it seems to me that the evidence all points to this body being a department of the Ministry of Agriculture. But Colas says, and Valls agrees with him, that this body is a legal personality; it is entitled to enter into contracts in its own name, and it is entitled to sue and be sued in its own name. The sole question, then, is: are those admitted facts inconsistent with it being, as prima facie it is, a department of the State of Spain? Unless these facts make it inconsistent with that, the evidence of the ambassador has not been displaced. I see no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it remaining and being a department of State. It would be surprising if it were so looked upon in this country. Many Ministers are constituted corporations sole. Some, as in the case of the Minister of Transport, for all purposes; some, as in the case of the Minister of Health, for limited

[[1] See *supra*, p. 162, n. 1.]

purposes; and I do not think anybody could say that under English law the Minister of Transport or the Minister of Health was not the Crown. Indeed, if it were not, neither of those Ministers could ever claim Crown privilege.

" It seems to me that Tucker L.J. had this in mind when, in the *Tass Agency* case ([1949] 2 All E.R. 274), which, as my Lords have said, left this point open, he said (*ibid.* 284):

> " ' I agree with Cohen, L.J, that, if that submission had been established, the plaintiff would not necessarily have succeeded in this appeal, and I should desire to reserve for future consideration the question whether or not the mere fact of a separate legal existence is necessarily inconsistent with the entity being part and parcel of a sovereign independent State. There again, it must depend on the foreign law. It may be that under some foreign systems of law such a separate existence might be considered inconsistent, but it is clear from our Acts of Parliament that we do not consider the fact that a government department may have a separate legal juristic existence as necessarily incompatible with it being a department of State for which immunity can be claimed.'

" That being the position under English law, in the absence of evidence to the contrary, I think this court is entitled to assume that the Spanish law is the same. Accordingly, there is no evidence that under Spanish law the fact that this body is a legal personality is inconsistent with its being a department of the State. Nor do I think that a decision to that effect involves an extension of the recognition of sovereign immunity, because on this basis Servicio Nacional del Trigo is a department of the State. It is not a company limited by shares in which the State holds the whole or a controlling interest, and it is not a body which for that or some other reason is wholly distinct from the State. If that were so—and it seems to me that that was the position in the American case[1] (24 N.Y. 2d. 201) to which my Lord has referred—then to grant sovereign immunity to such a body would be a real extension of the principle.

" That being so, the only remaining question is that of waiver. Like Jenkins L.J., I confess that at first impression it seemed to me remarkable if the true view was that the State of Spain had not submitted to the jurisdiction. Not only was there an unconditional appearance entered on the instructions of the head of this body, Senor Cavero, himself a senior civil servant, but again on his instructions security for costs was asked for and obtained; and it was not until the writ had been served for some 18 months that any steps were taken to stay the proceedings. I am satisfied, however, as the result of Mr. Kerr's argument and the cases to which he has referred, that there can be no submission in such a case as this unless it is made by a person with knowledge of the right to be waived, with knowledge of the effect of our law of procedure, and with the authority of the

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[[1] *Ulen & Co.* v. *Polish National Economic Bank*: see *Annual Digest*, 1938–1940, Case No. 74.]

foreign sovereign. As Mr. Kerr pointed out, proceedings against a foreign sovereign are wholly void. In *The Parlement Belge* (5 P.D. 197) Brett L.J., in giving the judgment of the court (*ibid.* 213), referred to the judgment of Lord Campbell in *De Haber* v. *The Queen of Portugal* ((1851) 17 Q.B. 171), where he relied on the Statute of Anne, the Diplomatic Privileges Act, 1708, with regard to ambassadors, and said (5 P.D. 197, 213):

" 'Can we doubt that in the opinion of that great judge (Lord Holt C.J.) the sovereign himself would have been considered entitled to the same protection, immunity, and privilege as the minister who represents him.'

And then Brett L.J. (*ibid.* 213) says that Lord Campbell cites the statute thus:

" 'It has always been said to be merely declaratory of the law of nations recognized and enforced by our municipal law, and it provides that all process whereby the person of any ambassador or of his domestic servants may be arrested, or his goods *distrained* or *seized* shall be utterly null and void." . . . The decision [of Lord Campbell] therefore is that the immunity of the sovereign is at least as great as the immunity of an ambassador.'

" In those circumstances it does seem to me that it requires some solemn act of the foreign sovereign to bring to life something which is otherwise completely dead; and, without referring to the cases, I think that *The Jassy* ([1906] P. 270) and the case before Astbury J., *In re Republic of Bolivia Exploration Syndicate Ltd.* ([1914] 1 Ch. 139), support that view. So far as this case is concerned, it is true that we have not had the benefit of an affidavit from Senor Cavero, but for my part I cannot impute to him knowledge of the effect of entering an unconditional appearance. Quite apart from that, it seems to me that the evidence is clear that although he is the person, the intermediary, to pass on instructions to English solicitors to deal with a case in England, he is bound to consult the appropriate minister as to whether sovereign immunity should be waived or not. It is true this does open up the rather alarming prospect that a foreign sovereign may allow proceedings to continue for years in this country before taking the point: but for my part I think that that is a theoretical difficulty. I do not think any person, even though he be a foreign sovereign, would be likely to be believed if in such an extreme case he were to come forward and assert that he had had no knowledge whatever of the proceedings. So far, however, as this case is concerned, I am satisfied that the point has been properly taken and that there has been no waiver. For these reasons I would dismiss the appeal."

Singleton, L.J. in his dissenting judgment, after commenting upon the facts of the case, and after examining earlier cases at some length, continued: " I know of no case which goes as far as does the claim made by the defendants here. I cannot find that it has been almost universally recognized that if a government sets up a legal entity, something which may contract on its own behalf as a limited company does in this country, it can succeed in a claim for sovereign immunity in respect of the activities of that company or entity. The claim goes further than has been generally recognized, and, in the interests of good government, and in the interests of business relationship and business dealings throughout the world, I do not think that the claim ought to be allowed on the material before us. In one of his affidavits the ambassador speaks of how the courts, he feels sure, would regard any trespass on the sovereign immunity of the State of Spain. I feel quite sure that the courts of this country would not knowingly do anything which they understood to be a violation of the sovereign immunity of the State of Spain, but the position is wholly different, it seems to me, if a separate entity is set up and is allowed to trade with its own people conducting its business. One is not trespassing upon sovereign immunity in saying that the body so created should not have the immunity granted to a foreign sovereign or to a foreign State.

"I would refer to the report of *Ulen & Co.* v. *Polish National Economic Bank* (24 N.Y. 2d. 201[1]), a decision of the Court of Appeal of the State of New York. I read part of the report (*ibid.*):

" 'The government of the United States and the governments of friendly foreign nations are immune from suit, the domestic sovereign on the historic principle that no court has power to command the King, and the foreign sovereign on implied consent of all sovereigns as a matter of comity.

" 'Theoretically, immunity of domestic sovereign from suit is a matter of right, while immunity of foreign sovereign is a matter of favor; but, since the favor is reciprocal, one immunity is, in practice, as obligatory upon the judicial branch as the other.

" 'A corporation organized by either a domestic or a foreign government for commercial objects in which the government is interested does not share the sovereign's immunity from suit.

" 'A bank created by Republic of Poland as a State institution, but as a "distinct legal person" possessing the right of "autonomous legal representation," whose stock was owned by the State, municipalities, and State and municipal enterprises, was not immune from suit on interest coupons attached to bonds issued by it and guaranteed by the Polish Government.'

"I recognize that upon the facts that case is by no means the same as that which is before this court, but I feel that it is right that I should refer to it, and I shall read a part of the judgment of Close J., who gave the judgment of the five members of the court who were sitting. He said (24 N.Y. 2d. 201, 206):

" 'There appears to be no decision in either the United States Supreme Court or in the New York Court of Appeals dealing with corporations formed by foreign governments. There are several such cases, however, in the lower Federal Courts in which the same conclusion has been reached as in the case of domestic governmental corporations. In *Coale*

[[1] See *supra*, p. 168, n. 1.]

v. *Société Co-op. Suisse Des Charbons, Basle, D.C.* ((1921) 21 Fed. 2d. 180[1]), the defendant was a corporation formed by the Swiss government for the importation of coal. The charter and by-laws were subject to governmental approval. The government appointed seven of the seventeen directors, and was entitled to all the net profit above six per cent. The plaintiff sued on a contract of sale which had been signed in the defendant's behalf by the Swiss Minister. The defendant claimed immunity. The District Court held that the defendant was not immune from suit and was liable on the contract. A similar conclusion was reached in *United States* v. *Deutsche Kalisyndikat Gesellschaft* ((1929) 31 Fed. 2d. 199[2]) in the case of a corporation formed and controlled by the French Government for the purpose of exploiting potash mines in Alsace. It was held that a (*ibid.* 202)

> " ' " suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned solely by the government."

" ' We approve the principle of these latter cases and conclude that a corporation organized by either a domestic or foreign government for commercial objects in which the government is interested, does not share the immunity of the sovereign. There is a dispute in the present case as to whether the defendant is a corporation, but it is of no actual importance whether it be called by that name or not. It has all the characteristics of a corporation. For present purposes the most significant fact is that the Bank is described in its own charter as " a distinct legal person ". Since it is a person quite distinct from the Polish government, the reasoning employed in the foregoing authorities with respect to corporations applies with equal force to the defendant. This characteristic also distinguishes the present case from certain authorities cited by the defendant. Thus in *Oliver-American Trading Co.* v. *Government of United States of Mexico* ((1924) 5 Fed. 2d. 659, 661[3]), where the plaintiff sued on a contract made with the National Railways of Mexico, it appeared that there was no corporation or legal person existent under that name. " National Railways of Mexico " was merely a name for a system of railroads, directly owned and controlled by the Mexican government. Accordingly it was held that the foreign government was entitled to prevail in its claim to soveriegn immunity. The same feature was present in *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen* ((1930) 43 Fed. 2d. 705[4]), which involved the Swedish State Railways; and in *Mason* v. *Intercolonial Railway of Canada* . . . ((1908) 197 Mass. 349) where the railroad was owned directly by the King of England. . . . Having concluded that the defendant is not immune from suit, we do not reach the question of whether immunity was or could be waived by the provisions of the trust agreements.'

" That decision seems to me to make it quite clear that there is no recognized acceptance of the claim made by the defendants in this case that the sovereign immunity should extend to a corporation or to a legal entity set up by a sovereign State, even though it be a

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[[1] See *Annual Digest*, 1919–1922, Case No. 88.]
[[2] *Ibid.*, 1929–1930, Case No. 71.]
[[3] *Ibid.*, 1923–1924, Case No. 21.]
[[4] *Ibid.*, 1929–1930, Case No. 70.]

department of State. As I have said, I think so to hold would be extending the principle, for which I see no sound reason.

"On the second point, it is claimed by Mr. Roche, on behalf of the plaintiffs that even if it could be said that the defendants were entitled to have succeeded on the claim of sovereign immunity, they have submitted to the jurisdiction of this court and so waived that right. On looking at the facts of this case, I should have thought that they had done so. The solicitors now appearing for the defendants were instructed to enter an appearance, and they entered an unconditional appearance; they were instructed to ask for an order for security for costs, and that was done long before the defence of sovereign immunity was set up. The ambassador states his view of the defendants and of the powers that certain people within or under the Ministry of Agriculture have. It seems to me that on the facts of this case there is a wholly different position to that which has been considered in any other case on this branch of the law. Prima facie, only certain people have authority to waive a right which is the right of the Government, but if the Government or the State goes outside the ordinary practice and founds a separate company or juridical or juristic person to do its business, one would expect it to leave the carrying on of the business to the body or entity which it has set up. The business would include the making and, perhaps, the breaking of contracts. There is no affidavit from the gentleman who made the contract as to how he came to put the clause concerning disputes into the contract. There is no affidavit from the head of the department, the senior civil servant who gave instructions to the solicitors. It might well be that one would find that he was carrying out his normal duty. We do not know. Although we have had cited to us authorities to show that in an ordinary case only a person authorized to waive diplomatic privilege can do so, I am not satisfied upon the evidence in this case that the gentleman who gave instructions to the solicitors had no such power. I should have thought it was in the ordinary course of his duty to instruct solicitors to put in a defence, to enter an appearance, or to ask for security of costs. If that was a submission to the jurisdiction I do not see why it should not be held that he was acting in the ordinary course of business left to him, or why it should not be held that he on behalf of the defendants had waived their right, or the right of the State to claim sovereign immunity. Notwithstanding those two authorities—*The Jassy* ([1906] P. 270) and *In re Republic of Bolivia Exploration Syndicate Ltd.* ([1914] 1 Ch. 139; 30 T.L.R. 146)—I feel that, in view of what happened in this case, the defendants ought not to be allowed to take the point, even if this was a case to which sovereign immunity would apply, for they themselves, in my judgment, had submitted to the jurisdiction. The State of Spain created the defendants as a legal entity and enabled them to trade with citizens of, or with corporate bodies in, other countries.

In such a case the defendants ought to be bound by the ordinary practice. We do not know what view the head of the department took of his powers. A State may create many such trading entities and if they act in the ordinary course it ought not to be open to the State to say they were not authorised so to do. Otherwise trading and business relationships would become impossible.

"Mr. Kerr directed our attention to some words in the judgment of Astbury J. ([1914] 1 Ch. 139, 156):

> " 'Thirdly, I am far from satisfied that a subordinate secretary can effectually waive his privilege without the sanction of his Sovereign or Legation, and it is clear that whatever knowledge R. E. Lemke possessed, the objection on the ground of privilege is now taken with the sanction and at the instigation of the Peruvian Legation.'

"In this case the point is taken at the instance of the Spanish Government a year or more after the defendants would appear at first sight to have submitted to the jurisdiction of this court. It would be amazing if it were to say, as Mr. Kerr claims, that a company or entity in the eyes of the law of Spain could have appeared before the court of first instance, and if they had lost and if their appeal had been dismissed in this court, they could have gone to the House of Lords and there successfully claimed sovereign immunity.

"In my judgment the appeal should be allowed."

[Report: L.R. [1957] 1 Q.B. 438.]

Jurisdiction—Exemptions from—Foreign States—Money Belonging to One Sovereign Wrongly or Mistakenly Transferred to Defendant Servant of Another Foreign Sovereign—Action to Recover Money—Whether Foreign Sovereign, Not a Party to Proceedings is Impleaded—Applicability of Immunity to a Debt—Relevance of Possession and Control.

NIZAM OF HYDERABAD *v.* JUNG.

England, High Court of Justice (*Chancery Division*). *July* 30, 1956.

(Upjohn J.)

Court of Appeal. December 20, 1956.

(Lord Evershed M.R., Birkett and Romer L.JJ.)

THE FACTS (as stated by the Court).—" By this motion the court was asked to set aside the writ issued in this action on July 8, 1954, and the concurrent writ issued pursuant to the order of Wynn-Parry J. on January 11, 1955, giving leave to serve out of the jurisdiction, as against the third defendant, Habib Ibrahim Rahimtoola (hereafter referred to as ' Rahimtoola '), and to stay all proceedings as against the second defendant, Westminster Bank Ltd., on the ground that the action impleaded the Government of Pakistan or, alternatively, sought to interfere with the right or interest of such Government to or in the sum of £1,007,940 9s. 1d., standing to the credit of Rahimtoola with the Westminster Bank Ltd., hereafter referred to as 'the debt.' Alternatively, the motion sought to discharge the order of Wynn-Parry J. giving leave to issue and serve the concurrent writ of summons on Rahimtoola on the ground that the affidavit in support thereof did not disclose the relevant facts known to the plaintiffs at the time of such application.

"The action in question was by the Nizam of Hyderabad and his Government claiming as against the three defendants payment of the debt, and the circumstances in which the claim was made were as follows: In September, 1948, there was standing to the credit of the Government of the Nizam of Hyderabad with the Westminster Bank Ltd. this debt, which represented part of larger sums formerly standing to the credit of two accounts in the name of the Nizam or his Government which were earmarked for the purchase of machinery. Two persons only had power to operate the account, namely, either the first defendant, Nawab Moin Nawaz Jung (hereafter referred to as 'Moin'), then Finance Minister of the Nizam's Government, or the Agent-General for Hyderabad in London, Mir Jung (hereafter referred to as 'Mir'). At this time the forces of the Indian Government were invading the State of Hyderabad, and four or five days before September 20, 1948, Moin or Mir called on Rahimtoola, then High Commissioner for Pakistan in the United Kingdom, at his official residence in Hampstead [London], and there was an interview at which Moin (or Mir), Rahimtoola himself and Sir Zafrullah Khan, then Foreign Minister of Pakistan, were present.

"Rahimtoola gave a detailed account on affidavit of the interview, which had not been disputed. He said that the representative of the Nizam came to ask him to accept a transfer into his name of the funds standing to the credit of the Nizam's Government with the Westminster Bank Ltd. Sir Zafrullah Khan instructed him to accept the transfer. Rahimtoola objected on the ground that the Government of Pakistan should not become involved, but his objection was overruled by Sir Zafrullah, who directed him to agree to a transfer to an account in his name but to be described as the High Commissioner for Pakistan. Sir Zafrullah also directed Rahimtoola to sign the necessary specimen signature forms; which he did. Rahimtoola stated that he would never have agreed to the transfer unless he had been expressly instructed to do so as High Commissioner for Pakistan and on behalf of his Government by Sir Zafrullah, under whose instructions as High Commissioner he was bound to act. It was never suggested to Rahimtoola that he was to accept the funds on his own account as a private individual as agent or trustee for the Nizam, and, had it been so suggested, he would have refused to do so, as he would have considered it improper so to act while holding the position of High Commissioner. He did not know whether the moneys so transferred to him were personal moneys of the Nizam or State moneys, and whether Moin or Mir had been given any instructions upon the matter. He further said that he would have refused to deal with this debt except in accordance with the instructions of his Government.

" Moin appeared to have been temporarily in London at this time, and on September 16, 1948, he gave written instructions to the Westminster Bank Ltd. to close the account of the Nizam's Government ' by transfer of the balance to the credit of Mr. Habib Ibrahim Rahimtoola, High Commissioner for Pakistan in London whose specimen signatures are enclosed herewith.' The bank received this letter by hand on September 20, and immediately carried out its instructions, and so informed Rahimtoola on the same day. Two days later a series of cables started to arrive from Hyderabad asking the bank to arrange that no withdrawals were permitted from the Nizam's account until further instructions were received from the Nizam, and to arrange for a retransfer of the debt. Some of these cables were routed through the Government of India, but it was too late. The title of the account in the books of the bank to which the transfer was made was ' Habib Ibrahim Rahimtoola, High Commissioner for Pakistan in London.'

" In 1950 the Westminster Bank Ltd. became aware that the Government of India was laying claim to the debt. On July 8, 1953, Rahimtoola (who had some 17 months previously ceased to hold the office of High Commissioner for Pakistan in the United Kingdom and was then Ambassador to France), acting upon the instructions of his Government, instructed the Westminster Bank Ltd. to transfer the debt, together with all interest accrued thereon, into the name of Mr. Ispahani, the then High Commissioner for Pakistan in the United Kingdom. The bank refused to do so, referring to the fact that shortly after the transfer, the Nizam's Government had purported to object to the transfer and also to the fact that the Government of India laid claim to the debt. Lengthy correspondence ensued, during the course of which the Westminster Bank Ltd. suggested interpleader proceedings; but the Government of Pakistan were not prepared to waive their immunity, and the suggestion was dropped. Finally, the writ in this action was issued.

" A statement of claim was delivered on November 5, 1954, in which the plaintiffs' claimed payment of the debt on three grounds; (a) as money held in trust for the plaintiffs; (b) as money due and owing to the plaintiffs; or (c) as money had and received to the use of the plaintiffs. The plaintiffs also claimed the debt as against the defendant Moin as money paid away in breach of trust."

Held (*per* Upjohn J.): that (1) it was not established that Moin had acted in breach of trust or duty in transferring the money to

Rahimtoola; (2) in the consideration of what constituted a sufficient interest in property to establish a claim to immunity, possession and control were relevant in the case of a chattel, but in relation to a pure debt unsupported by pledge or security the question depended on title alone; (3) Rahimtoola could not be regarded as a third party holding as trustee for the true owner (*i.e.*, the Nizam) since the debt was vested in him as an official of his Government, and the matter had to be treated a though the debt were that of the foreign sovereign; (4) the plaintiffs could not go behind the legal title and show that the equitable title was in them; so that the fact that the legal title was in the servant of the Sovereign was sufficient to support its claim to immunity, even though it could claim no equitable title and the claim made by it would appear to involve a wrong; (5) the writs should accordingly be set aside as against Rahimtoola, and proceedings stayed as against the Bank.

Upjohn J., after dealing with some preliminary matters, said: " In the next place, there has been much discussion in the authorities as to what is a sufficient interest in the property to establish a claim for immunity from process. When the subject-matter of the dispute is a chattel such as a ship or bar of gold, possession or control are very relevant matters to consider upon the claim to immunity; but in relation to a pure debt unsupported by pledge or other security such as a bearer bond, the question must depend upon title and nothing else. There can be no possession or control of a pure debt: *Haile Selassie* v. *Cable and Wireless Ltd.* ([1938] Ch. 847[1]):

" Next, it must now be taken as settled law that it is not sufficient to establish a claim to immunity that the foreign sovereign should merely make a claim to such property. I take the law to be as stated in the judgment of Lord Jowitt in the Privy Council in *Juan Ysmael & Co. Inc.* v. *Indonesian Republic Government* ([1955] A.C. 72, 89; [1954] 3 All E.R. 236[2]):

" ' In their Lordship's opinion a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached.'

" The question, then, that I have to consider is whether the Government of Pakistan establish a title to this debt which is not merely illusory or manifestly defective. It is submitted on the Government's behalf that a sufficient title is in them by reason of the

[1] [See *Annual Digest*, 1938–1940, Case No. 67.]

[2] [See *International Law Reports*, 1954, p. 95, at pp. 98–99.]

fact that the legal title to the debt is admittedly in Rahimtoola in his official capacity of High Commissioner of Pakistan and in no other capacity whatever. The fact that on the evidence as it stands at present the Government show no equitable title, counsel submits, matters not. He submits (rightly, in my view) that it is well settled in the case of chattels that a proprietary interest need not be established, but possession or control is sufficient, and in such cases whether possession or control was rightful has always been considered irrelevant. Thus, in *The Jupiter* ([1924] P. 236; 40 T.L.R. 815[1]), it was regarded as irrelevant that the possession of the U.S.S.R. was wrongful, as it was subsequently proved to be: *The Jupiter* (*No.* 3) ([1927] P. 122, 250; 43 T.L.R. 210, 741[2]); but that was a case of impleading a sovereign State in an action in rem. However, in the *Dollfus Mieg* case[3] ([1952] A.C. 582), where no question arose of impleading the foreign governments by making them parties directly or in an action in rem, the rightfulness of the claim to some bars of gold was regarded as irrelevant; the right to immediate possession was sufficient.

"The judgment of the Privy Council in the *Juan Ysmael* case ([1955] A.C. 72[4]) clearly proceeded on the footing that the claim to title of the ship there in question was plainly bad, and that the claim to immunity therefore failed; but it is clear that the whole case proceeded on the footing that the Indonesian Government did not at the relevant time have possession or control of the ship, for the acting captain of the ship always remained true to his masters, the appellants. The law was briefly summarized by Lord Maugham in the *Cristina* case ([1938] A.C. 485[5]) thus (*ibid.* 517):

> " 'If the foreign government wishes to recover property in this country, I am of opinion that it must, subject to certain exceptions, prove its case. If it is, rightly or wrongly, in possession of property in this country, no action can be brought against it by persons claiming title to or any interest in such property.'

"Sir Andrew Clark, on the other hand, submits that Rahimtoola was a trustee of the debt for the true owner, the Nizam. He referred me to a number of authorities which he submits establish the proposition that where property such as a debt is in a third party claiming no beneficial interest therein, as in this case, then before a foreign sovereign can be said to be impleaded he must show a title to that property which is not illusory or manifestly defective. He relied on two lines of cases. The first deals with the position at common law. Lord Maugham in the *Cristina* case ([1938] A.C. 485) put it thus (*ibid.* 517):

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[1] See *Annual Digest*, 1925–1926, Case No. 100.]

[2] *Ibid.*

[3] *United States of America and Republic of France* v. *Dollfus Mieg et Cie and Bank of England*: see *International Law Reports*, 1952, Case No. 37.]

[4] See *supra*, p. 176, n, 2.]

[5] See *Annual Digest*, 1938–1940, Case No. 86.]

> " 'An independent sovereign sued for breach of promise of marriage in our courts can indeed claim to be outside of our jurisdiction; but there is no authority for the view that if he wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within Professor Dicey's rule he would in my opinion be bound to prove his title.'

This statement of the law, however, is not universally accepted: see the observations of Lord Jowitt in the *Dollfus Mieg* case ([1952] A.C. 607), which I quote later.

" In equity the courts have been less tolerant of a claim to immunity than at common law. Sir Andrew cited to me a number of authorities which establish the proposition that the court will not decline jurisdiction to administer a trust fund merely because a foreign sovereign claims to be interested therein. It was put in this way in *Strousberg* v. *Costa Rica Republic* ((1880) 44 L.T. 199) by James L.J. (*ibid.* 201):

> " 'There is one other class of cases to which the Master of the Rolls has referred, which may appear to be also an exception, and that is the case in which a foreign sovereign may be named as a defendant, for the purpose of giving him notice of the claim which the plaintiff makes to funds in the hands of a third person or trustee over whom this court has jurisdiction. The trustee is within the jurisdiction of the court, and the trustee holds the funds; and if a person says " I call upon A.B. the trustee of the fund to pay it to me because it belongs to me," and A.B. the trustee says, " I cannot pay it to you because there is a foreign sovereign interested," then you say, " Well, the foreign sovereign may, if he thinks fit, come here to defend himself;" and if he will not come here to defend his right or his interest in that fund, in that case the trustee must do it for him, or leave it undone. The only jurisdiction of the court in that case is not a jurisdiction over the sovereign, or over the sovereign's property; but simply over its own subjects, and over property which is within its own jurisdiction.'

See also *Duke of Brunswick* v. *King of Hanover*, ((1844) 6 Beav. 1); *Gladstone* v. *Musurus Bey* ((1862) 1 H. & M. 495); *Larivière* v. *Morgan* ((1872) L.R. 7 Ch. 550) (reversed on the facts in the House of Lords) ((1875) L.R. 7 H.L. 423).

" If Rahimtoola is indeed to be regarded as truly a third party holding the debt as a trustee for the true owner, then, in my judgment, both at common law and in equity, before the Government of Pakistan can be said to be impleaded it must establish a title to the debt. That title must necessarily be an equitable title in the circumstances of this case, for the legal right to the debt is in Rahimtoola. It may be that, if a court is administering a trust, the sovereign must establish a true title, whereas at common law it is only necessary to establish a title not manifestly defective; but it is not necessary to consider that further, for in this case the sovereign establishes no title in equity, and, in my judgment, neither in law nor in equity is the sovereign impleaded.

" The crux of this case, therefore, is whether Rahimtoola is to be regarded as a third party holding the debt for the true owner. Although Rahimtoola makes no claim to immunity on any ground personal to him, it seems to me clear that the debt was vested in him as an official of his Government. The debt was not vested in ' the Government of Pakistan ' eo nomine, but it was vested in a servant of that Government in his capacity as such. That was a natural course to take in the circumstance. I do not think that I ought to draw narrow distinctions between title to a debt in the name of the sovereign or his servant.

" Lord Jowitt, in the *Dollfus Mieg* case ([1952] A.C. 582[1]), said (*ibid.* 606):

" ' Jenkins J. in the course of his judgment, to which I would desire to express my indebtedness, expresses the matter as follows ([1949] Ch. 389): " A foreign sovereign State (unless embodied in a personal sovereign visiting this country) cannot, so far as I can see, be in actual physical possession of property here otherwise than by its servants. Accordingly, if actual physical possession by a foreign sovereign State were essential to immunity on the score of possession by such State, immunity on that ground could only be claimed in respect of property in this country in the actual physical possession either of some personal sovereign or of a person who could be shown to be in the strict sense a servant of a foreign sovereign State (so as to make his possession that of his master) or else to be himself entitled to diplomatic immunity. The application or exclusion of the principle of immunity would thus be made to depend on nice distinctions respecting the particular mode in which a foreign sovereign State might happen to exercise dominion over property brought by it to this country in its possession or control. For instance, if gold were brought to this country by a foreign sovereign State to be applied in the purchase of goods for the public purposes of that State and placed in the hands of a servant of the State concerned to be applied in making such purchases in accordance with its directions, the gold would be protected by the principle of immunity on the score of possession by the foreign sovereign State, irrespective of any immunity from process the servant might be entitled to claim in his own person. If on the other hand gold brought to this country by a foreign sovereign State for similar purposes was deposited by it with a banker or other agent for safe custody and disposal in accordance with its directions, the gold would at once become exposed in the hands of the banker or other agent to any adverse claims there might be, and the principle of immunity would afford no protection from actions brought by third parties against the banker or other agent for the purpose of establishing such claims. I cannot think it would be right to make the application or exclusion of the principle of immunity (based as it is on substantial reasons of policy) turn upon nice distinctions of this kind.' "

" Lord Jowitt continued ([1952] A.C. 607):

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[1] See *supra*, p. 177, n. 3.]

" ' Although I agree with the observations of Lord Maugham in *The Cristina* ([1938] A.C. 475, 519) that the doctrine of immunity should not be extended, yet I think that we should unduly limit the doctrine if we were to decline to apply it to any bailment which might be made by or on behalf of the foreign sovereign in which the action is brought against the bailee. If it were so limited the result would be that if the foreign sovereign deposited his bag or his jewellery with the railway or with the hotel or with the bank, proceedings could be taken against the bailee, claiming the delivery of the article which had been deposited by or on behalf of that sovereign.'

" In the same case Lord Porter said ([1952] A.C. 612):

" ' No doubt the doctrine should, as Lord Maugham said in *The Cristina* ([1938] A.C. 485, 518) be narrowly watched, but it has always to be remembered that governments must act through servants or agents and often through bailees, and it would destroy the efficacy of the doctrine if it were strictly confined to personal possession.'

" Those were all cases dealing with chattels; but, in my judgment, the same reasoning ought to apply to the case of a debt. No case in this country has been cited to me which is on all fours with this case; but a claim to immunity in respect of a debt has been upheld in the District Court of New York in *Bradford* v. *Chase National Bank of City of New York* ((1938) 24 Fed. Supp. 28[1]), a case reversed on its facts on appeal. However, the recent authorities undoubtedly contain warnings against extending the doctrine of sovereign immunity from process: see especially the observations of Lord Maugham in the *Cristina* case ([1938] A.C.485[2]). There is, then, no absolute and universal rule that a foreign independent sovereign cannot be impleaded in the courts in any circumstances: *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar* ([1952] A.C. 318; [1952] 1 T.L.R. 1106; [1952] 1 All E.R. 1261[3]). Furthermore, this is not a case where the foreign sovereign has brought any property to this country; it has been transferred to him by the servant of another sovereign.

" In my judgment, however, the general principle must be applied. The debt being in Rahimtoola as the servant of his Government, the matter must be treated as though the debt was due to the Government, though that does not, of course, entitle the Government to claim immunity on the ground that it is being directly impleaded.

" The plaintiffs, however, seek to go behind that legal title and to show that, on an investigation of the circumstances surrounding the transfer and applying the municipal law of England, the equitable title is in the plaintiffs. In my judgment, however, being, in effect, clothed with the legal title, it is to that very investigation into the equitable title which the Government of Pakistan as a sovereign State is entitled to decline to submit. In my judgment its insistence on its legal title is sufficient to support the claim to immunity, even though no equitable title is shown, and the claim would therefore seem to involve a wrong against the equitable owner. The case is analogous to wrongful possession of a chattel in the hands of the servant of a foreign State.

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[1] See *Annual Digest*, 1938–1940, Case No. 17.]
[2] See *supra*, p. 177, n. 5.]
[3] See *International Law Reports*, 1952, Case No. 38.]

" The theory behind the claim to immunity has been variously described, and I attempt no repetition; but I think the following quotation from Sir Robert Phillimore in *The Charkieh* ((1873) L.R. 4 A. & E. 59) seems particularly appropriate to the circumstances of the present case (*ibid.* 97):

> ' The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign State . . .'

The present transaction was an intergovernmental transaction; let it be solved by intergovernmental negotiations. The writ and concurrent writ must be set aside as against Rahimtoola.

" With regard to the bank, the plaintiffs are suing the bank for the debt due at law to Rahimtoola. Proceedings must be stayed against them, for to continue to sue them is to interfere with the property of the sovereign. That is clearly the proper course when dealing with a claim in detinue: see *Dollfus Mieg* ([1952] A.C. 582). This cannot be likened to the case of a claim for damages for conversion. In this case, unlike the claim in respect of the 13 bars of gold in the *Dollfus Mieg* case ([1952] A.C. 582), there is no claim for damages against the bank, nor does this case resemble the *Haile Selassie* case ([1938] Ch. 839[1]). The question was to whom were Cable and Wireless Ltd. indebted? In this case, so far as the bank is concerned, there is only one answer to that question—Rahimtoola. Both Moin and Mir had authority to operate the account, and the statement of claim does not allege that the bank had any knowledge of the alleged but, as I have held, unproved breaches of duty by Moin or Mir. The plaintiffs can only reach the debt through Rahimtoola. Therefore the action against the bank must be stayed.

" It becomes unnecessary, therefore, to consider the second ground on which the motion is based, namely, that the relevant facts were not fully disclosed on the application for leave to issue a concurrent writ. It is right, however, that I should say this, that it is now conceded that there was not a full disclosure; but I accept the apology which on affidavit has been tendered to this court, and am satisfied that there was no intention whatever to mislead.

[[1] See *supra*, p. 176, n. 1.]

"The actual form of order will be: That the writ of summons issued in this action and the concurrent writ of summons and all the subsequent proceedings may be set aside as against the defendant Rahimtoola; and that the action be stayed as against the defendant the Westminster Bank Ltd."

The first plaintiff, the Nizam of Hyderabad, appealed, and on this appeal an affidavit of the Nizam was filed showing that the fund had been transferred to Rahimtoola without the Nizam's authority.

Held (by the Court of Appeal): that the decision of Upjohn J. must be reversed.

(1) The applicability of the doctrine of sovereign immunity depended on the extent to which the prosecution of the claim so affected the right and interest of the sovereign as to amount in one way or another to a suit against the sovereign.

(2) On the evidence, the money was not transferred to Rahimtoola as one of the principal officers of the State of Pakistan or so as to identify its holder with the State itself or make the vesting equivalent for all purposes to a vesting in the State; the transfer was a wrongful act on the part of Moin, the Nizam's agent, or, if the agent thought at the time of the transfer that he was acting within the authority, it had been shown that he acted under a mistake.

(3) Rahimtoola, not having accounted to Pakistan before he was informed in a letter of May 17, 1954, by the Nizam's solicitors that the fund belonged to the Nizam personally and had been paid to him without the Nizam's authority, the State of Pakistan could not claim to have "control" over the fund as against the Nizam in the absence of any claim on their part to a beneficial title; and, accordingly, Rahimtoola stood as third party wholly distinct from the Government or State of Pakistan. The case was not governed by the principle that one holding money as agent for another was accountable only to him; it fell within the exception where, before the agent had in fact accounted to his principal or otherwise altered his position to the same effect, it appeared that the payment was made to the agent under a mistake of fact or in consequence of some wrongful act. Accordingly, the defendants were not entitled to rely on the doctrine of sovereign immunity.

Lord Evershed, reading the judgment of himself and Birkett L.J., after discussing the facts at considerable length, as also some earlier cases, in particular *United States of America and Republic of France* v. *Dollfus Mieg et Cie* ([1952] A.C. 582[1]), continued: "In the *Dollfus Mieg* case ([1952] A.C. 582) the rule was held to be applicable because, notwithstanding the admitted absence of title in the sovereigns and its admitted presence in *Dollfus Mieg et Cie*, the sovereigns as bailors of the bars with the bank had vis-à-vis the bank an immediate right to recover their possession with which inevitably, the continuance of the action would interfere; so that if the sovereigns desired to recover the possession which they formerly had, they would be compelled to come to the English court for the purpose. (See *per* Earl Jowitt (*ibid.* 604, 605, 607), *per* Lord Porter (*ibid.* 612, 613), *per* Lord Radcliffe (*ibid.* 619).)

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[1] See *International Law Reports*, 1952, Case No. 37.]

" The present proceeding relates, not to chattels but to a chose in action. It is, therefore, upon matters of essential fact distinct from the *Dollfus Mieg* case ([1952] A.C. 582). For where the subject-matter of the proceedings is a chose in action there can be no question, strictly, of possession. Prima facie, any rights or interests in respect of it must be matters of title. So much has been laid down for us by this court in *Haile Selassie* v. *Cable & Wireless Ltd.* ([1938] Ch. 839; 54 T.L.R. 996; [1938] 3 All E.R. 394[1]). The judgment of the court in that case must clearly be preferred, in our view, to the suggestion in the judgment at first instance in the American case of *Bradford* v. *Chase National Bank* ((1938) 24 Fed. Supp. 28[2]) that there might be ' possession ' (in the true significance of that term) of a chose in action. And if the question depend upon some claim of title on the part of the sovereign, then it cannot, in our judgment, suffice that the sovereign has at some time asserted a title to the fund if, when the rule is invoked, there appears no evidence at all in support of such claim—more particularly if it is conceded on behalf of the sovereign's representative that the claim to immunity is not founded upon any title or proprietary interest. (See, for example, *Juan Ysmael & Co. Inc.* v. *Indonesian Republican Government* ([1955] A.C. 72; [1954] 3 All E.R. 236[3]).

" So far, then, Sir Andrew's first submission would appear to have persuasive force. For if it be said by A that a chose in action is vested in B as agent for and on behalf of himself, A, then it would ordinarily be understood that A claimed to be the beneficial owner. But for the purpose of considering the application of the rule of sovereign immunity, as we have tried to express it by reference to Lord Radcliffe's opinion, we are not satisfied that the dichotomy between possession and title is necessarily exhaustive, or that it may not be relevant to consider the conception of ' control ' (a word appearing in Lord Atkin's well-known statement in *The Cristina* ([1938] A.C. 485) to which Lord Jowitt referred in the *Dollfus Mieg* case ([1952] A.C. 582, 604) in relation to a chose in action). For if the sovereign be shown in some sense to have ' control ' of the debt, then the question arises whether, if continuance of

[[1] See *Annual Digest*, 1938–1940, Case No. 67.]
[[2] *Ibid.*, Case No. 17.]
[[3] See *International Law Reports*, 1954, p. 95.]

the proceedings interfere with that ' control ', the court will not in substance be asserting jurisdiction over the sovereign himself. It is true that Sir Wilfrid Greene M.R. in the *Haile Selassie* case ([1938] Ch. 839, 847) used the phrase ' In the case of a debt such as that with which we are concerned there can be no question of possession or control.' But the circumstances of the debt with which the court was there concerned did not raise at all the point here raised, namely, that the State of Pakistan had an unfettered right to require Rahimtoola, in whom the debt was vested as their agent, to deal with it in all respects as they required. In that sense (if such right existed at the relevant date) the State may sensibly be said to have a ' control ', interference with which would at least compel the State (if they decided to exercise it) to come to the English court. However the ' control ' is defined in terms of the law, it might certainly qualify as one of those interests ' lesser than a proprietary interest and even than a possessory interest ' which Lord Jowitt thought were not to be confined to ships.

" It was on this point that Upjohn J. rejected Sir Andrew's first argument, being of opinion that the State of Pakistan was ' in effect clothed with the legal title to the debt.' The conclusion depended upon the judge's view of the facts in evidence before him, namely, that the transfer of the debt to Rahimtoola was a transfer to him in his capacity as High Commissioner and as a mere servant or agent of the sovereign State. It is for this reason that the argument before us turned so much upon the proper inference to be drawn from the affidavits of Rahimtoola relating to the meeting on or about September 16, 1948.

" But before we leave the *Dollfus Mieg* case ([1952] A.C. 582) in order to return to that evidence, there was one other point made by Mr. McKenna on the speeches of Lord Jowitt and Lord Porter upon which we should like to make one observation. We refer to the passage where Earl Jowitt cites (*ibid.* 606) and approves language used by Jenkins J. when the case came before him at first instance, and to the language of Lord Porter (*ibid.* 612): ' it has always to be remembered that governments must act through servants or agents . . . ' These passages were invoked in support of the view that the vesting of the fund in an officer or representative of the State of Pakistan should, prima facie at least, be assumed to be necessarily equivalent to a vesting in the State itself. We cannot accept this argument. No doubt in a case of chattels a sovereign State, as distinct from a personal sovereign, must act through individual agents. But in the case of a chose in action it is not so. Of course, individual persons must execute any direction for dealing with the fund. But there would be or have been no difficulty (if such had been the wish of those concerned) in vesting the chose in action itself in the State (or Government) of Pakistan, eo nomine, giving to Rahimtoola the necessary authority to operate the fund on behalf of the State (or Government). After all, prior to the transfer, the fund stood in the name of ' the Government of Hyderabad,' Mir and Moin having the right of operation on that Government's behalf.

" Nonetheless the evidence in favour of the conclusion of agency, which we have set forth at length earlier in this judgment, is of a formidable character. In his first affidavit Rahimtoola stated in terms that he took the transfer as his Government's agent. In his expanded account of the meeting Rahimtoola explained his original objection to taking the transfer on the ground that he thought it wrong that Pakistan should be involved in the matter; but that his objection was overruled by his Foreign Minister under whose express and compelling directions he took the transfer, not (as he said) having any real knowledge of the beneficial ownership of the fund and regarding himself as being bound accordingly to deal with it as ordered from time to time by his Government. Rahimtoola was, after all, the High Commissioner for Pakistan in London and was so described in the bank's books.

" Formidable though the effect of the evidence be, we still think that there is force in Sir Andrew's argument the other way. It is a truism that men may make a bargain, clear enough in terms, without any proper appreciation of its inevitable legal consequences. But we find it, for our part, not easy to suppose that those who took part in the meeting in September, 1948, could have contemplated that, on the very next day, the State (or Government) of Pakistan could have required a transfer of the fund into their own name and thenceforward have arranged, without further reference to the Nizam or any of his representatives, that the fund should be operated by persons of their own choice and nomination. No doubt Rahimtoola was chosen because, as High Commissioner for his country, he was regarded as a person in whom trust could be placed. It may well be, also, that the Nizam's representative felt able to rely on the Government of Pakistan and their relations with their own High Commissioner as providing additional security for the fund. It appears that Rahimtoola was regarded as personally well disposed to the Nizam. We note that, according to a letter dated as early as April 4 exhibited to Gupta's affidavit, it was even at that time suggested that the name of Rahimtoola should be added to those of Moin and Mir as the persons authorized to operate the account when it stood in the name of the Government of Hyderabad.

" In all the circumstances it seems to us that there is at least much to be said for the view that the real purpose and intention of the transaction of September, 1948, were that the fund should stand in the name of Rahimtoola because he was High Commissioner for Pakistan and so long at least as he held that office; but without his being, in the eye of the law, the mere agent of his Government or State; and that such might upon a full investigation of the facts turn out to be the proper conclusion without thereby involving any real inconsistency with Rahimtoola's testimony or impeaching in any way his acknowledged good faith or veracity. But whether or not Rahimtoola took and was intended to take, the transfer as agent for the State (or Government) of Pakistan, the transfer to him in, or by virtue of, his office as High Commissioner cannot be treated, in our judgment, as a transfer to one of the principal officers of the State which would so identify its holder with the State itself as to have made the vesting equivalent for all relevant purposes to a vesting in the State.

" Having regard to the view which we have formed upon a further point taken by Sir Andrew in his reply, it is not necessary for us to express a final conclusion upon the question whether Rahimtoola should be regarded as a mere agent, and we prefer for ourselves not to do so. Sir Andrew's further point is a statement of an exception to the general rule that one who holds money or funds as agent for another is accountable only to his principal. The exception arises when, before the agent has in fact accounted to his principal or otherwise altered his position to the same effect, it appears that the payment or transfer was made to the agent under a mistake of fact or in consequence of some wrongful act. It is expressed substantially in the form which we have used in *Bowstead on Agency*, 11th ed., p. 266, and in Halsbury's *Laws of England*, 3rd ed., vol. 1, p. 233. Its first appearance in the books seems to have been in the year 1777 in *Buller* v. *Harrison* ((1777) 2 Cowp. 565). In that case insurers had paid insurance moneys to the agent of the assured believing that the loss had been ' fair '. When they discovered, before the agent had remitted the moneys to his principals, that the loss had in fact been ' foul,' they claimed to recover from the agent. ' Now the law is clear,' said Lord Mansfield C.J. (*ibid.* 568), ' that if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal; ' . . . Is it conscientious then, that a defendant should keep ' money which he has got by [his principals'] misrepresentation, and should say, though there is no alternative in my account with my principal, this is a hit, I have got the money and I will keep it? ' Lord Mansfield C.J. had no difficulty in answering his question in the negative. His decision was followed by Lord Ellenborough C.J. in the case of *Cox* v. *Prentice* ((1815) 3 M. & S. 344), to which Sir Andrew referred us, and its principle has since been approved in this court by Sir Wilfrid Greene M.R. in *Gowers* v. *Lloyds and National Provincial Foreign Bank* ([1938] 1 All E.R. 766, 773; 54 T.L.R. 550), and in the House of Lords in *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* ((1907) 79 L.T. 263, 265; 23 T.L.R. 696) by Lord Atkinson.

" Lord Mansfield C.J. in terms referred to mistake. But the principle, at any rate, applies, in our judgment, as it is stated to do in the textbooks to which we have referred, whenever the circumstances are such that he who has paid the money might have recovered it from the agent's principal, whether on the ground of mistake of fact, or on the ground stated in the textbooks 'on account of some wrongful act'—or, indeed, for any valid reason. Thus, in *Buller* v. *Harrison* (2 Cowp. 565) itself, the payment by the insurers had been obtained by the principals' misrepresentation. In *Holland* v. *Russell* ((1861) 1 B. & S. 424) underwriters had paid a shipowner's agent, himself innocent, under a policy which they could have repudiated on the ground of failure by the agent's principals to disclose that the ship insured was already damaged, but it was held that they could not recover from the agent, since he had paid over the moneys to his principal. In *Ex parte Bird* ((1851) 4 De G. & S. 273) (in which case *Buller* v. *Harrison* (2 Cowp. 565) was referred to in the course of argument) payment had been made by bankers in respect of forged acceptances, their claim against the acceptor's innocent agent failing because, on the evidence, the agent appeared already to have accounted to his principal.

"Let it be assumed in the present case that the effect of the transfer of the fund into Rahimtoola's name in September, 1948, was not indeed equivalent to a transfer to the Government (or State) of Pakistan but, nevertheless, was, in the light of his evidence (that is, that the transfer was made to him as agent for his Government; and that he had no knowledge of the true beneficial ownership of the fund and no reason to suppose the existence of any limits on Moin's or Mir's authority to deal with the fund), to make him accountable only to his principal, the Government (or State) of Pakistan. In May, 1954, he received the plainest intimation from the Nizam's solicitors that the fund had belonged in equity to the Nizam personally and that the transfer in September, 1948, had been without the Nizam's authority and in breach of his agents' duty—and, if it be necessary, it is not suggested that the intimation was not received also by the Government or State of Pakistan. The allegations in Messrs. Stanley Johnson & Allen's letter have since been incorporated into the sworn evidence of the Nizam himself. In the light of these circumstances, Sir Andrew, in our judgment, makes good his point that, whatever was the earlier situation, at any rate from the date of the receipt of Messrs. Stanley Johnson & Allen's letter, the State of Pakistan could no longer—and certainly cannot at the present time—claim to have the 'control', the right to command future dealings with the fund, as against the Nizam, in the absence of any claim of title on their part. On the evidence now before the court, the transfer to Rahimtoola is shown to have been a wrongful act on the part of the Nizam's agents. Alternatively, and even if Moin and Mir supposed that they were acting within their authority (as Rahimtoola also supposed), this is now shown to have been a mistake. The same result is also, in our view, reached by another route. As a result of the letter of May, 1954, Rahimtoola (and his alleged principal) received clear notice, since confirmed by the Nizam's sworn testimony, that the fund belonged in equity wholly to the Nizam and that his agents had no power to give that interest away; so that the person in whose name the legal interest stood held it on a resulting trust for the beneficial owner who has intervened, by assertion of his equitable right, before the agent has accounted to his principal. In any case, as it seems to us, the alleged principals not establishing in themselves, in Upjohn J.'s words, ' a scintilla of title,' Rahimtoola now stands in truth as a third party, wholly distinct from the Government or State of Pakistan.

" The point upon which, in our view, the Nizam is entitled to succeed before us was not put to, or considered by, the judge, who did not have before him the Nizam's affidavit. Had he had the benefit of that argument and had he had that evidence, we think that he might well have decided the case otherwise than he did. For he observed that the result at which he arrived seemed to involve a wrong against the equitable owner. It is relevant to add that Lord Maugham's warning in *The Christina* ([1938] A.C. 485[1]) that the doctrine of sovereignty immunity should be carefully watched was in no way dissented from in *Dollfus Mieg* ([1952] A.C. 582[2]). (See, for example, *per* Earl Jowitt (*ibid.* 607) and *per* Lord Porter (*ibid.* 612).

" Mr. McKenna's answer to the point was that the question whether or no there had been any mistake, any wrongful act on the part of the Nizam's agents, was one that would ordinarily have to be determined at the trial; and that it was the trial to which the sovereign State declined to submit. He referred again to Chamber's affidavit and his assertion there of the claim made by the State of Pakistan; he alleged further that the State still retained de facto the control of the fund and pointed to the fact that, notwithstanding what had been said by the Nizam and on his behalf, Rahimtoola had refused to comply with the Nizam's request. In our judgment these answers do not suffice. If there were in truth a question of title to be determined the matter might be otherwise. But, on the evidence as it stands, the statements of the Nizam and made on his behalf in regard to beneficial ownership and breach of duty by his agents are uncontradicted; and the State and Government of Pakistan have shown no ' scintilla of title ' of any kind. If Rahimtoola declined to comply with the Nizam's demands, it seems, as matters now stand, that he was not entitled so to do. On the other hand, he would now appear certainly not bound or entitled to obey the orders in regard to the fund of the State or Government of Pakistan: and we observe that the bank felt itself after the correspondence of May, 1954, unable to accept the direction for transfer of the fund into the name of Rahimtoola's successor, as it had indeed felt after the Nizam's communication of September, 1948.

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[1] [See *Annual Digest*, 1938–1940, Case No. 86.]

[2] [See *supra*, p. 182, n. 1.]

" Having reached this conclusion upon the point taken by Sir Andrew in reply, it is in strictness unnecessary for us to express our view upon his second point in opening the appeal, namely, that, whatever the right or interest of the State of Pakistan, they hold as bare trustees merely and that the court will not be deterred from exercising its equitable jurisdiction to administer trust property, even though the trustee is a foreign sovereign unwilling to submit to the jurisdiction. But since the question was fully argued and since the present case may go further, we think it right to say that upon it our conclusion coincides with that of the judge. As Lord Radcliffe observed, the practice of the Chancery courts, as shown by the decided cases, stands somewhat by itself. But the only judicial authority for the view that the courts will exercise its equitable jurisdiction against a foreign sovereign who is a trustee appears to be that contained in the judgment of Lord Langdale M.R. in the case of *Duke of Brunswick* v. *King of Hanover* ((1844) 6 Beav. 1, 39). The passage in the judgment relied upon is that where the Master of the Rolls said:

> ' So where a defendant in this country is called upon to account for some matter in respect of which he has acted as agent for a foreign sovereign, the suit would not be perfect as to parties, unless the foreign sovereign were formally a defendant, and by making him a party, an opportunity is afforded him of defending himself, instead of leaving the defence to his agent, and he may come in if he pleases; in such a case, if he refuses to come in, he may perhaps be held bound by the decision against his " agent ".'

Lord Langdale M.R.'s statement, qualified as it is in any case by the word ' perhaps ', was, at best, obiter: for, in the case before him, he allowed the general demurrer to the Duke of Brunswick's bill on the part of the King of Hanover, who was also and for some purpose a British subject. Nor, in our judgment, can Sir Andrew obtain support for his proposition from the case of *Gladstone* v. *Musurus Bey* ((1862) 1 H. & M. 495), in which an interim injunction was granted against the Bank of England. The language of James L.J., on the other hand, which Upjohn J. cited—and which we do not repeat—from the case of *Strousberg* v. *Republic of Costa Rica* ((1880) 44 L.T. 199, 201), seems to us to be against Sir Andrew's proposition. The statement of the Lord Justice assumes that the trust property is ' in the hands of a third party or trustee, over whom this court has jurisdiction.'

" We were referred to Professor Hamson's note in *The British Year Book of International Law*, vol. 27 (1950), pp. 293, 298, of the case before the French Cour de Cassation of *L'Affaire Vestwig*. In that case the Supreme French Court appears to have rejected a claim to immunity on the part of the Norwegian State on the ground that the Norwegian Government, in which the relevant account had stood, was clearly shown to be in the position of a ' mandataire ' only; and the learned commentator suggested that the decision would be in accordance with the law as adopted by the English courts. We are not satisfied that, assuming the position of a 'mandataire' to be equivalent to that of bare trustee under our law, our courts would follow the view of the French courts, at least as a general proposition: and the case of *The Jupiter* (*No.* 3) ([1927] P. 122, 250; 43 T.L.R. 210, 741[1]), cited by Professor Hamson, may fairly be said not to support in fact the contrary view.

" If it be right that the English courts will in general administer trust funds held by a foreign sovereign, then it would appear to follow that the court would be prepared to make orders for an account and the like against the sovereign in order to make the jurisdiction effective. We cannot think that this is so. The making of such orders and the penal consequences which ordinarily attach to their neglect would appear to be in direct conflict with the English courts' duty to respect the status and dignity of the foreign sovereign which, as we understand it, is at the root of the rule itself.

" We add in conclusion a word as to the position of the bank. Mr. Cross, on the bank's behalf, supported upon the main question the argument of Sir Andrew Clark; but he further submitted that (as the judge decided) if the case for a stay were made good by Rahimtoola, then the bank also should be entitled to the benefit of the stay. The bank is, after all, in the position of a debtor and, as such, desires (naturally enough) that it should be determined to whom the money properly belongs, and should, if demanded, be paid. But if the proceedings were stayed against Rahimtoola but allowed to proceed against the bank alone, then the latter would be exposed to a real risk of being twice vexed in respect of the same claim. Having regard to the view which we have formed, it is unnecessary for us to express any view upon this point; and we do not do so. We think, for the reasons which we have given, that upon the facts now before the court Rahimtoola fails to make good a case for a stay of proceedings at this stage. In our judgment, the appeal should be allowed."

Romer L.J. held that the transfer of the fund by Moin to Rahimtoola gave rise to a resulting trust solely in favour of the plaintiffs. Rahimtoola was accordingly bound as trustee, so long as the fund remained in his control and he had received no contrary instructions from his principals, to comply with the direction of the letter of May 17, 1954. That obligation overrode and superseded any duty arising from his agency to obey directions given to him subsequently by his principals, for his agency had become subordinated to his trusteeship.

[Report: L.R. [1957] 1 Ch. 185.]

[1] See *Annual Digest*, 1925–1926, Case No. 100.

NOTE.—On appeal to the House of Lords, the decision of the Court of Appeal was reversed and the decision of Upjohn J. affirmed (see [1958] A.C. 379). This appeal will be reported in *International Law Reports*, 1957.

Jurisdiction—Exemptions from—Foreign States—Loan Issued by Foreign State in Country of Forum—Whether Courts of Forum Competent to Exercise Jurisdiction—The Law of France.

THE BELGIAN CONGO *v.* MONTEFIORE.

France, Court of Appeal of Paris. October 31, 1956.

THE FACTS.—The respondent (plaintiff in the Court of first instance) was the holder of Government bonds issued in 1901 in France by the then independent State of the Congo. In an action brought by him against the Belgian Congo, represented by the Belgian Minister for the Colonies, the Court of first instance, the *Tribunal Civil de la Seine*, held that the Belgian Congo had ceased to exist as an independent State in 1907, when it had become a Belgian colony, and that as a colony it could not claim exemption from the jurisdiction of the French courts. Further, a loan raised by a foreign State in France was held not to be a transaction of a sovereign character which would preclude the French courts from exercising jurisdiction.[1] The Belgian Minister for the Colonies appealed.

Held: (i) that as in 1907 the Congo had become a Belgian colony and had thus become merged in the Kingdom of Belgium, the true defendant was the Kingdom of Belgium, which, as a sovereign State, was exempt from the jurisdiction of the French courts; and (ii) that the raising of a loan by a foreign State was a transaction of a sovereign character which was not subject to the jurisdiction of the Court, and that the appeal must accordingly be allowed.

The Court said: " The bonds bear the inscription ' Independent State of the Congo ' and make reference to the Decree of October 15, 1901, which is headed: ' Leopold II, King of the Belgians, Ruler of the Independent State of the Congo '. The Conference of Berlin of February 26, 1885, acknowledged that the Congo had the status of a sovereign State. On November 28, 1907, King Leopold II ceded to the Belgian State the sovereignty over the territories constituting the independent State of the Congo, with all the rights and obligations appertaining to the latter, and a Law of October 18, 1908, approved this cession. On the same day a Belgian Law, commonly known as the ' Colonial Charter ', made provision for the legal status of the Belgian Congo. This instrument, which is of the greatest importance to the present issue, provides in Article 1 that the Belgian Congo has a legal personality distinct from that of metropolitan Belgium, and Article 2 refers to ' Colony '. Article 1 of the Law further provides that the assets and liabilities of Belgium and the Colony remain separate and distinct. It follows from these instruments that as the result of the Treaty of Cession the Congo became merged with Belgium in the Belgian State. In international law the Congo is not distinct from the Belgian State, and accordingly the action concerning the Congo is directed against the Belgian State itself. The subsequent Law, the so-called Colonial Charter, appears to contradict the Treaty of Cession. The latter, however, which defined the relations between the Congo and Belgium and laid down the obligations of the Colony in so far as concerns the liabilities taken over by the State, is essentially an internal measure which cannot detract from the value and scope of the act of cession, which dominates the whole question, and which has been accepted by the French Republic. Moreover, when sovereignty over the territories constituting the independent State of the Congo was ceded to Belgium in 1907, although there was a cession there was no abolition of sovereignty, *viz.*, abolition without substitution. On the contrary, this sovereignty, which was not abolished, passed to the Belgian State. Finally, loans issued by a sovereign State are transactions of a sovereign character of that State, and even in French municipal law State loans are regarded as contracts of public law. It follows that the Belgian State, as assignee of the rights of sovereignty over the Congo, cannot be made subject to the jurisdiction of the French courts in respect of its sovereign acts. For these reasons the appeal of the Belgian Congo is allowed and the judgment under appeal reversed. The Court has no jurisdiction."

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[1] For the judgment of the *Tribunal Civil de la Seine* (dated February 16, 1955) see *International Law Reports*, 1955, p. 226, *sub nom. Montefiore* v. *The Belgian Congo.*

[Report: *Gazette du Palais*, December 22–25, 1956.]

Jurisdiction—Exemptions from—Foreign States—Waiver of Immunity from Jurisdiction—Institution of Proceedings by Foreign State—What Constitutes Institution of Proceedings—The Law of France.

SALABERT *v.* GOVERNMENT OF THE UNITED STATES OF AMERICA.

France, Tribunal Civil de la Seine. January 30, 1956.

THE FACTS.—A French company made an agreement with the plaintiff whereby the latter was given permission to run a hairdressing saloon on premises owned by the Company, for a period of twelve years. When the agreement still had five years to run, the shareholders of the Company sold all their shares to the Government of the United States of America, and the premises on which the plaintiff carried on his business became the property of the United

States Government. The Company was subsequently wound up. It was a term of the original agreement that the owners of the premises should be entitled to serve notice on the plaintiff terminating the agreement if at any time the plaintiff ceased actively to carry on the business of a hairdresser on the premises. The United States Government, as successors in title of the French Company, served notice on the plaintiff, in accordance with the terms of the agreement, on the ground that the plaintiff had closed his hairdresser's business. They did not, however, invoke a clause of the agreement which provided that any dispute between the parties thereto should be submitted to the President of the *Tribunal de Commerce de la Seine*, nor did they take any steps to institute proceedings against the plaintiff for possession of the premises. The plaintiff, who admitted that he had closed his business but alleged that he had been forced to do so as a result of structural alterations carried out on the premises by the United States Government, contended that the latter, by serving notice on him in accordance with the agreement, had constituted themselves plaintiffs and had thereby voluntarily submitted to the jurisdiction of the French courts, and that he was therefore entitled to ask the Court to ascertain the cause of the closure of his business and assess the damage suffered by him as a result of such closure.

Held: that the serving of notice on the plaintiff did not constitute the institution of proceedings by the United States Government and did not therefore amount to a waiver of immunity from the jurisdiction of the French courts; the Court was accordingly not entitled to entertain the plaintiff's application.

The Court said: " It is a traditional rule of international law that sovereign States and their Governments are not subject to the jurisdiction of any other State. This rule has a special significance in our law in that it forms part of the *ordre public*, although foreign States may waive its application and submit voluntarily to the jurisdiction of the French courts. The Judge who is seised of proceedings served on a foreign Government is under a duty to examine the question of his own competence where the foreign Government does not put in a formal plea to the jurisdiction and, in particular, where, as in the present case, it does not appear and where its non-appearance is not such as to permit the inference of a waiver of immunity. It is therefore necessary, before dealing with the subject-matter of the present application, to ascertain whether the facts as set out in the summons and the relevant documents justify the conclusion that the foreign Government which has been summoned can be deemed to have waived the privilege of immunity from the jurisdiction. Although a foreign State may be subject to the jurisdiction of the French courts in respect of certain private transactions, and in particular in respect of commercial transactions where it conducts itself like a private individual, this does not appear to have been established with certainty in the present case. The acquisition of the property to which reference will be made presently was intended to provide accommodation for employees or civil servants of the Government of the United States of America, some of whom may belong to their diplomatic personnel and may be entitled, in that capacity, to personal immunity.

"A foreign State undoubtedly waives its immunity from the jurisdiction when it takes the initiative in bringing a private individual before the French courts. A private individual so brought before the courts is entitled to put forward any defence or counterclaim, and the foreign State concerned is not then entitled to put in a plea claiming immunity. The plaintiff relies on a written agreement dated November 27, 1945, whereby the limited company 'Hôtel des Deux Mondes' granted him the right to manage a hairdressing saloon for a period of twelve years until December 31, 1957. On June 23, 1952, all the shareholders of the Company sold their shares to the United States Government. The Company was wound up, and the premises on which the hairdressing business was being carried on is now owned by the United States. On January 17, 1956, the United States Government served notice on the plaintiff, stating that the hairdressing saloon was closed, and asking the plaintiff to comply with a clause in the agreement which provided that the business was to be in continuous operation, and further stating that the owner intended to rely on the condition in the agreement which provided that the contract was to become null and void if its terms were not heeded within eight days. The plaintiff admits that the business is closed, but alleges that he has been forced to close it as a result of structural alterations made to the premises. He asks for an expert's report on the causes of such closure and an assessment of the damage he has suffered. Service of notice by a foreign State on a private individual in France is not equivalent to invoking the jurisdiction of the French courts. The serving of notice merely intimates that a claim is being made and that the expiration of the time-limit gives the owner the right to institute proceedings for a declaration terminating the contract, and for possession. The notice before the Court only contains that part of the clause which provides for termination, but not the sentence which confers jurisdiction on the President of the *Tribunal de Commerce de la Seine*. It therefore remains uncertain whether the United States Government will institute proceedings for possession against the plaintiff before the French courts. If such proceedings are instituted the plaintiff, who will then be the defendant, will be able to plead all the defences open to him as if the owner of the premises were a private individual, and in particular to contend that he is not guilty of a breach of the contract. As long as the foreign Government has not waived its immunity by instituting proceedings before a French court, the French courts are not entitled to exercise jurisdiction over the preventive action now being sought by the plaintiff. For these reasons this Court is not competent to deal with the application put forward by Salabert."

[Report: *Gazette du Palais*, April 11–13, 1956.]

Jurisdiction—Exemptions from—Foreign States—Acts *Jure Imperii* and *Jure Gestionis*—Immunity from Execution—Acts *Jure Gestionis* Not Connected with Territory of Forum—International Law—Relation to Municipal Law—The Law of Switzerland.

KINGDOM OF GREECE *v.* JULIUS BÄR & CO.

Switzerland, Federal Tribunal. June 6, 1956.

THE FACTS.—On June 30, 1926, a Swedish Company, the Svenska Tändsticks Aktiebolaget (STAB), granted a loan of one million pounds sterling to the Greek State, to be repaid over a period of 28 years, in the following manner: the Greek Government sold to STAB 28 bonds, of a total value of one million pounds sterling, one of which was to be redeemed every year. Bonds 1–5 were so redeemed between 1927 and 1931. However, Bond No. 6 was never redeemed. In 1953 it became the property of Julius Bär & Co., a bank of Zürich. On February 14, 1955, at the instance of that Bank, the Court of first instance of Geneva issued an order attaching to an amount of 2,500,000 Swiss francs, all sums, moneys, debts, etc., standing in the name or in favour of the Greek State in various Genevese Banks. The Greek State contested the attachment in the Genevese courts. At the same time it instituted an appeal "*de droit public*" before the Federal Tribunal on the ground that the attachment was a violation of the immunity from jurisdiction of a foreign State, and accordingly a violation of the principles of international law "inherent in federal law". It was contended on its behalf that such an appeal could be instituted even while cantonal proceedings were still pending. It was further contended that earlier decisions of the Federal Tribunal, drawing a distinction between acts *jure imperii* and acts *jure gestionis* for the purpose of admitting the immunity of a foreign State, should be reviewed, and that, in particular, it should be laid down that the immunity from execution of a foreign State was absolute.

Held: that the order of attachment issued by the Court of first instance of Geneva must be set aside. The Federal Tribunal had jurisdiction over claims of this nature even though cantonal remedies had not been exhausted. The immunity from jurisdiction of a foreign State was not absolute, even in respect of measures of execution. But Swiss courts could assume jurisdiction over acts *jure* *gestionis* of a foreign State only if these acts had some connection with Swiss territory. That was not the case here.

The Court said, in part: " The non-observance of ' principles of international law ' must, in conformity with case law, be assimilated to the violation of a treaty, and an appeal ' *de droit public* ' is accordingly receivable even though cantonal remedies have not first been exhausted . . . Moreover, in Switzerland the principles of international law are considered to be part of municipal law. . . . Accordingly, when a debtor contests an attachment order by reference to the principle of the immunity from jurisdiction of foreign States, he raises a question which may be assimilated to a dispute relating to a violation of federal legal provisions concerning the delimitation of competences *ratione loci* (Article 84 (d) of the Federal Law concerning the Organization of the Judiciary, of 1943). Disputes of that kind may be brought before the Federal Tribunal by way of appeal ' *de droit public* ' without cantonal remedies having previously been exhausted. . . .

" There is no legal provision laying down whether and up to what point a foreign State may be subjected to the jurisdiction of Swiss courts or to measures of forced execution on Swiss territory. Accordingly, the matter has been settled by judicial decisions. The Federal Tribunal has decided that the principles of the immunity from jurisdiction of foreign States is not an absolute rule of general scope. A distinction must be made according to whether the foreign State acts in the exercise of its sovereignty (*jure imperii*) or in a private law capacity (*jure gestionis*). Only in the former case is it completely covered by the principle of immunity from jurisdiction. In the latter case it may be sued before the courts of another State, and may be subjected to measures of forced execution (see the *Dreyfus Case*,[1] *Walder Case*,[2] *Sogerfin Case*, October 7, 1938 (unpublished), *Seckel Case*, April 12, 1940 (unpublished), and *Case of the Italian Republic*, May 17, 1955 (unpublished)). However, even in the last named case the Federal Tribunal does not recognize the jurisdiction of Swiss courts without further condition; on the contrary, it requires some connecting factor. Not every private law relationship entered into by a foreign State can give rise to proceedings in Switzerland. That relationship must at least have some links with Swiss territory. That condition was already formulated in the *Dreyfus Case*, although only by implication. In that case the Federal Tribunal admitted the possibility of the attachment by Swiss authorities of assets of the Austrian State for the purpose of guaranteeing the reimbursement of a loan raised by that State. The fundamental reason for that decision was that the loan had been raised in Switzerland, that Austria had undertaken to reimburse it in Switzerland in Swiss currency, and that Switzerland was as it were the theatre of all the operations. There was thus a clear link between the legal relationship which had given rise to dispute and Swiss territory. In the *Walder* judgment, the Federal Tribunal further elaborated its views on the requirement of a connecting factor: in order that a legal relationship to which a foreign State is a party may be considered to be connected with Swiss territory, it must either have its origin in Switzerland or fall to be performed in Switzerland, or the debtor must have at least taken certain steps which make Switzerland a place of performance. On that point the earlier decisions were confirmed in the judgments relating to *Seckel* and to the *Italian Republic*. Contrary to the opinion of the respondent there is no reason to modify this case law. It is not peculiar to Switzerland, and it has not, since its adoption some forty years ago, become contrary to the rules of international law through any change in those rules.

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[1] *Recueil officiel des arrêts du tribunal fédéral Suisse*, 44, I, p. 49.
[2] *Ibid.*, 56, I, p. 237.

"The foregoing principles have been introduced in a number of treaties recently signed by Switzerland. Thus Article 5 of the Agreement signed at Moscow on March 17, 1948, between the Swiss Confederation and the U.S.S.R. and concerning commercial representation of the U.S.S.R. in Switzerland provides that disputes relating to commercial contracts concluded or guaranteed in Switzerland by the Russian trade delegation shall be decided by Swiss courts, and that forced execution of final judgments may be levied on the assets and goods of the delegation.

"Article 15, paras. 1 and 2, of the Agreement concluded at Budapest on June 27, 1950, between the Swiss Confederation and the Hungarian People's Republic and concerning the exchange of goods and the settlement of payments provides that 'the attachment of goods of the Swiss Confederation in Hungary and of the Hungarian People's Republic in Switzerland may be ordered only with regard to private law debts which are closely connected with the countries where these goods are situate. A close connection within the meaning of this provision shall be deemed to exist in particular where the debt is governed by the law of the country in question; where the debt is to be performed in that country; where the debt is connected with a legal relationship which had its origin or was to be developed in that country; or where jurisdiction over disputes relating to that debt was given to the courts of that country.' An identical provision is included in the Agreement signed at Bucharest on August 3, 1951, on the same subject between the Swiss Confederation and the Roumanian People's Republic. These various treaties are in conformity with the decisions of the Federal Tribunal in that they exclude immunity from jurisdiction in cases in which the State is a party to a private law relationship and that relationship is connected with the territory of the country where it is invoked. Thus the requirement laid down by the Federal Tribunal that some connecting factor exist, is not only not contrary to the rules of international law, but has been codified in a number of treaties. That is another reason why the requirement should not be abandoned.

" It would be wrong to think that the case law established by the Federal Tribunal is contrary to the decisions taken by the Federal Council on July 12, 1918, and October 24, 1939, respectively. It is true that the decision of 1918 prohibits absolutely the attachment of or measures of forced execution on the assets of a foreign State. However, apart from the fact that that decision was taken by the Government in the exercise of its full power and at a time of unrest, it should be noted that in 1923 the Federal Assembly declined to embody the principles set forth in the decision in a federal Law, on the ground that the Federal Tribunal was competent to decide disputes relating to measures of forced execution ordered against a foreign State and that there was accordingly no danger that federal judicial decisions in the matter would lack uniformity. In that manner, the Federal Assembly as it were left the matter to the Federal Tribunal, even though some of its members considered that measures of forced execution on the assets of a foreign State were contrary to international law. Accordingly, the Federal Council on July 12, 1926, abrogated its decision of July 12, 1918. The decision of 1939, also taken in the exercise of full powers in a period of international upheaval, and abrogated as of September 3, 1948, did not prohibit the attachment of or measures of forced execution on the assets of a foreign State. It merely required the agreement of the Federal Council for such measures. In principle, therefore, such measures were admitted to be possible.

" The appellant would admittedly like the case law referred to above to be reviewed on two points. First, he raises the question whether a distinction should not be drawn between the *exercise* of jurisdiction and *measures of execution*, and whether an absolute immunity should not be accorded to foreign States in respect of measures of execution. This question must be answered in the negative. (See, to the same effect, the opinion of the Federal Department of Justice and Police and of the Federal Council: *Jurisprudence des autorités administratives de la Confédération pendant l'année* 1928, No. 51, p. 60.) As soon as one admits that in certain cases a foreign State may be a party before Swiss courts to an action designed to determine its rights and obligations under a legal relationship in which it had become concerned, one must admit also that that foreign State may in Switzerland be subjected to measures intended to ensure the forced execution of a judgment against it. If that were not so, the judgment would lack its most essential attribute, namely, that it will be executed even against the will of the party against which it is rendered. It would become a mere legal opinion. Moreover, while its effects would be less directly felt than those of measures of execution, such an opinion would also affect the sovereignty of the foreign State. If, therefore, measures of execution against a foreign State were prohibited in order to safeguard its sovereignty, logically the exercise of jurisdiction would likewise have to be prohibited. That would be contrary to current practice. The appellant alleges that Belgium and Italy, who derogate in a large degree from the principle of immunity from jurisdiction of foreign States, do not permit measures of execution against foreign States, or admit them only with important restrictions. The Federal Tribunal has already considered this matter in its *Walder* judgment,[1] and the explanations there given remain valid. The Court would merely add that the refusal of the Belgian authorities to order measures of execution against a foreign State is essentially motivated by the fact that in Belgium the Belgian State cannot be subjected to such measures. No such motive would be valid in Switzerland, where measures of execution are possible against the Confederation and, within certain limits, against the cantons and communes. Nor can it be said that since the main decisions on this subject were handed down by the Federal Tribunal, the dominant opinion in Switzerland on the question whether or not a distinction must be made between the exercise of jurisdiction and measures of execution, and whether or not foreign States should be accorded complete immunity from measures of execution, has changed. On the contrary, while the decision of the Federal Council of July 12, 1918, completely prohibited the attachment of and measures of execution against the assets of foreign States, the decision of October 24, 1939, permitted such action in principle, although subject to the agreement of the Federal Council. The recent treaties referred to above equally admit the principle of forced execution. Moreover, international opinion also has not altered. A Greek Law of December 17, 1938, merely makes the attachment of the assets of a foreign State or measures of execution against them subject to the agreement of the Minister of Justice. In Greek law such measures are accordingly possible. As far as foreign writers and foreign judicial decisions are concerned, an examination of them does not lead to the conclusion that at the present time opinion is unanimously or predominantly in favour of complete immunity from execution (*cf.*, for instance, von Praag in *Revue de droit international et de législation comparée*, 1935, p. 129; *Annuaire de l'Institut de droit international*, vol. 44, I, p. 28). Article 5 of the Resolution adopted by the Institute of International Law on April 30, 1954, prohibits the attachment of or measures of execution against the assets of foreign States only if these assets are used in the exercise of a governmental activity which has no relation to any commercial transaction. There is thus no reason to modify the case law of the Federal Tribunal in so far as it treats immunity from jurisdiction and immunity from execution on a similar footing.

[[1] *Loc. cit.* (*supra*, p. 196, n. 2), at pp. 248–249.]

"The appellant suggests further that the decisions to the effect that a distinction must be drawn between acts *jure imperii* and acts *jure gestionis*, and that immunity must be granted only in respect of the former, be re-examined. However, in view of the attitude of foreign States on this matter at the present time, the arguments of the appellant cannot be accepted. Even the United States and Great Britain, which upheld the theory of absolute immunity for a long time, have now abandoned it. (See, for instance, Gmür in *Annuaire Suisse de droit international*, 1950, p. 30; Irminger in *Revue Suisse de Jurisprudence*, 1955, p. 296.) In Greece, the acts *jure gestionis* of a foreign State are not covered by immunity from jurisdiction.[1] Finally, while Article 1 of the Resolution adopted on April 30, 1954, by the Institute of International Law provides that the courts of a State cannot take cognizance of disputes relating to the exercise of public authority by a foreign State, Article 3 lays down that the courts of a State have jurisdiction over actions against a foreign State or a corporate entity dependent on a foreign State if the dispute relates to acts which were not performed in the exercise of public authority.[2] In these circumstances, there is also no reason to modify the case law of the Federal Tribunal in so far as it draws a distinction between acts *jure imperii* and acts *jure gestionis*.

"In the *Dreyfus* and *Walder* cases, the Federal Tribunal considered that States which had raised public loans had performed acts *jure gestionis*. In the present case, a loan was raised by the State from a private company, in connection with a contract for the supply of goods. It is not necessary to determine whether that loan was an act of public authority or an act of private law, for, in any case, the condition required by earlier decisions, namely, that the act have some connection with Swiss territory, is not satisfied. The loan in dispute was not raised in Switzerland but in Sweden, and from a Swedish company, and the sum loaned was paid to the Greek Government by an English bank. The debtor, the Greek State, has not performed any acts which would make Switzerland a place of performance. Finally, it did not undertake to repay the loan in Switzerland; the reimbursement of the bonds and the payment of interest were to be effected in Athens, New York or London. Admittedly Article 3 of the contract of loan provides that reimbursement may be effected at any other place chosen by the lender, provided that two months' notice of that choice is given to the Greek Government before each reimbursement becomes due. However, that general provision, which does not expressly refer to any particular place in Switzerland but leaves the creditor full freedom to choose the place where he wishes to be paid, cannot lead to the conclusion that the parties agreed that the obligation should be performed in Switzerland. In any case, a provision of that kind, which permits any country to become the place of performance, does not constitute a special link with Switzerland. It is irrelevant that the reimbursement is at the present time claimed by a creditor domiciled in Switzerland, to whom the bonds have been transferred. That transfer, independent of the intention of the debtor, does not alter the fact that the legal relationship in dispute does not, in view of its substance and the circumstances of its origin, have any connection with Swiss territory. Since that relationship has no connection with Swiss territory, the Kingdom of Greece is entitled to rely on the principle of immunity from jurisdiction of foreign States."

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[1] See *Annuaire de l'Institut de droit international*, vol. 44, I, pp. 15 and 114.

[2] *Ibid.*, vol. 45, II, p. 294.

[Report: *Recueil Officiel des Arrêts du Tribunal Fédéral Suisse*, vol. 82 (1956), p. 75.]

Jurisdiction—Exemptions from—Foreign States—United States Military Base in Italy—Whether Department of United States Army Exempt from Jurisdiction of Italian Courts at Suit of Italian Employees of Base—Relevance of North Atlantic Treaty, 1949—The Law of Italy.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA *v.* SAVELLINI.

Italy, Court of Cassation (United Civil Chambers). October 17, 1955.

THE FACTS.—The respondent, plaintiff in the Court of first instance, had been a civilian employee of the United States military base at Livorno, Italy. He brought an action against the Department of the United States Army for wages alleged to be due to him under his contract of employment. The defendants contended that they were exempt from the jurisdiction of the Italian courts. Their plea to the jurisdiction was rejected by the Court of first instance on the ground that there was no specific treaty between Italy and the United States governing the operation of the base at Livorno and granting immunity from the jurisdiction of the Italian courts.

The defendants appealed.

Held: that the appeal must be allowed. Italy had impliedly recognized the immunity of the Department of the United States Army from the jurisdiction of the Italian courts by ratifying the North Atlantic Treaty, and there was accordingly no need for a specific treaty recognizing such immunity.

The Court said: " The appeal is directed against the finding of the Judge who rejected the claim of the Department of the (United States) Army to exemption from the jurisdiction of the Italian courts. The Department of the Army is not an autonomous entity but a military organization directly dependent upon the Department of Defence of the United States of America. The question arises, however, whether the Italian courts can exercise jurisdiction over the United States in respect of acts of that Department and the matters here in issue. The Judge relied on the jurisprudence of this Court, which has limited the immunity of foreign States from Italian jurisdiction to acts undertaken in the exercise of sovereign authority. In order that the immunity may apply it is necessary that the exercise of such public or political functions shall be recognized by the State within whose territorial limits they have been performed. The Court of first instance held that as Italy has not concluded any treaty concerning the operation of the American base at Livorno, the activities of the latter must be regarded as activities of a private character. Certain comments must be made on the reasoning adopted by the Court of first instance. While it is agreed that a foreign State is subject to the jurisdiction of the Italian courts unless its sovereign activity is recognized as such by the State in whose territory it is exercised, we must reject the proposition that the consent of Italy has been lacking in the present case. In this case we need not consider and solve the problem as to whether such recognition must necessarily be accorded by means of a treaty properly ratified and given executory force and by other means showing the consent of the host State. This question need not be considered because the activity of the North American base at Livorno falls within the framework of the North Atlantic Treaty, which has been ratified by Italy and given the force of law by Law No. 645 of August 1, 1949. This Treaty provides for continuous and effective mutual support between the signatory States and imposes a duty of mutual assistance in the event of aggression, also in the event of an attack upon the occupying forces of one of the Powers. The corresponding duties cannot be performed by limiting the scope and extent of such mutual assistance and by excluding the incorporation of the base at Livorno into the North Atlantic Treaty Organization. The nature of the terms used and referred to above does not admit of the limitations which have been inferred. Without saying that the concept of mutual assistance implies an entirely discretionary and political assessment beyond the control of the lower Court, [it must be held that] it is an assessment which falls within the competence of the competent political and administrative organs. As far as exemption from the jurisdiction of the Italian courts is concerned, it is sufficient to state that the exercise of the functions appertaining to the base falls within the framework of the provisions of the Treaty, which is necessarily elastic."

[Report: *Rivista di diritto internazionale*, 39 (1956), p. 91.]

Jurisdiction—Exemptions from—Foreign States—*Acta Jure Imperii* and *Acta Jure Gestionis*—Contract of Employment between National of Country of Forum and Cultural Academy of Foreign State—Whether Disputes Arising Out of Contract Subject to Jurisdiction of Local Courts—The Law of Italy.

HUNGARIAN PEOPLE'S REPUBLIC *ET AL.* v. ONORI.

Italy, Court of Cassation (United Chambers). May 24, 1956.

THE FACTS.—The plaintiff (respondent herein) brought an action against the Hungarian People's Republic (appellants herein) for damages for wrongful dismissal. For some years she had been employed on general administrative and domestic duties at the Hungarian Academy in Rome. The Academy was a cultural institute established in Rome in pursuance of the Italo-Hungarian Cultural Agreement of February 16, 1935, and was originally a private establishment known as the " Hungarian Academy of Painting and Sculpture ". It was later taken over by the Hungarian Government. The latter claimed immunity from the jurisdiction of the Italian courts on the ground that the contractual relationship between the parties was one which involved the exercise of " sovereign functions " by the Hungarian Government. The lower Court overruled the plea to the jurisdiction, and the Hungarian Government appealed.

Held: that the appeal must be dismissed. The contractual relationship between the parties was not one involving the exercise of " sovereign functions " by the Hungarian Government but was of a private character, and the tasks performed by the respondent were not such " public functions " as would entitle the Hungarian Government to claim immunity from the jurisdiction of the Italian courts.

The Court said: " The appeal is based on an alleged violation of Article 360, in conjunction with Article 37, of the Code of Civil Procedure and the Royal Decree of February 25, 1935 (No. 272), which gave the force of law to the Cultural Agreement between Italy and Hungary signed on February 16, 1935. It also alleges a violation of Article 10 of the Constitution of the Republic of Italy and of customary rules of international law. More particularly, the appellants attack the judgment of the Court of Appeal of Rome because that Court held that the Italian courts had jurisdiction over the State of Hungary and its organs concerning the dispute with the respondent, which arose out of a contract of employment between them and the respondent. They say that the Court of Appeal did not take into account that this relationship between them and the respondent, which is of a sovereign character, arose out of and in the execution of the above-mentioned Agreement and was therefore outside the competence of the Italian courts. They also say that the Court of Appeal failed to consider that the Hungarian State had and has sovereign power to organize, in every respect, the [Hungarian] Academy in Rome where the respondent rendered services inherent in the public purposes of that institution. In resolving the problem before the Court we must, above all, bear in mind the rule that a State is entitled to immunity from the jurisdiction when as the holder of sovereign power it acts within the sphere of its own Constitution. In addition, such immunity is granted where it is expressly provided for in an Agreement between subjects of the international community even if the legal relationship governed by such Agreement is not of a sovereign character. In the Italo-Hungarian Agreement referred to above, which was designed to develop cultural relations between the two States in the scientific, literary and artistic spheres, the Contracting Parties, while undertaking, on the one hand, to establish an Italian Institute in Budapest and, on the other hand, a Hungarian Institute [Academy] in Rome, and providing for the management of these Institutes and fiscal concessions for the construction and repair of their respective buildings, made no reference, for the purpose of the exercise of jurisdiction by their respective courts, to contracts of employment and service which would ensure adequate personnel to run the two Institutes. It follows that in the present case the Court must have recourse to the general principles of international law and must ascertain whether within the framework of the above-mentioned relationship the foreign State has exercised a sovereign activity as a sovereign body within the scope of its own Constitution, or whether it has acted as a private individual within the internal Constitution of the other State. Where this Court has to examine the prerequisites of jurisdictional competence it is not precluded from an enquiry into the facts. The immunity of the Hungarian State from the local jurisdiction could certainly not be denied if the Hungarian State had entrusted the respondent with the performance of official functions, because in that case the functions of the respondent could be identified with the will and activity of the [foreign] State. In such a case, where the appointment is made in pursuance of a measure having a sovereign content and relating to the organization and functioning of the State, no interference by another State could be permitted. As far as the contract of employment with the respondent is concerned, these conditions are not satisfied. The respondent was originally employed by a private enterprise in Rome [the Hungarian Academy of Painting and Sculpture]. Subsequently, a change of employer took place and the Hungarian State became the respondent's employer. The private character of the employment, however, remained unchanged in that the Hungarian State did not then act in a sovereign capacity since the work of the respondent, while performed in the interests of that State, had no legal connection with the latter's sovereign tasks. The records show that no public functions relating specifically to the cultural tasks of the Academy were entrusted to the respondent. She performed tasks ancillary to the internal services of the Academy, such as looking after the hostel annexed to the Academy, the canteen, the collection of debts, the payment of suppliers and the domestic staff, the guest rooms and the general cleanliness of the premises. The letter of July 7, 1949, from the Hungarian Ministry of Education and Fine Arts to the respondent, who had contested the legality of the notice given to her by the management of the Academy, shows that the Ministry justified the notice which it had authorized to be given by saying that there was no need for any particular notice to be given by that State authority because the respondent ' always received her salary, not direct from the Ministry but, like all the other servants, from the special fund administered by the Academy for its purposes '. This letter, in so far as it refers to the work entrusted to the respondent, contradicts the contention of the appellants that the relationship between themselves and the respondent falls within the scope of the sovereignty of the Hungarian State, which is vested with the *potestas imperii* to perform its functions. As had been held by this Court in a recent case (No. 1996) decided on June 14, 1954, subjects of international law can, if they do not invoke their position of supremacy, have recourse to relations of a private law character. This implies waiver of immunity and therefore acceptance of the jurisdiction of the Italian courts in respect of legal transactions entered into in that manner. This is the case with regard to the relationship between the Hungarian State and the respondent. The appeal is therefore ill-founded. . . ."

[Report: *Rivista di diritto internazionale*, 39 (1956), p. 190.]

Jurisdiction—Exemptions from—Foreign States—Damage Caused by Foreign Armed Forces in Belligerent Operations—Treaties—Operation and Enforcement of—Rights of Individuals to Invoke Treaty Provisions—Agreements on Compensation of War Damage.

SOCIÉTÉ ANONYME " EAU, GAZ, ÉLECTRICITÉ ET APPLICATIONS "
v. OFFICE D'AIDE MUTUELLE.

Belgium, Court of Appeal of Brussels. January, 25, 1956.

THE FACTS.—On March 22, 1945, a motor car belonging to the appellant Company was damaged in a road accident by a British military truck bringing troops back from leave. It was not contested that the military vehicle was responsible for the accident. The appellant Company sued the respondent, the Office d'Aide mutuelle, responsible in Belgium for the payment of indemnities for loss caused by the Allied Governments in connection with military operations, for the amount of the damage. The respondent formally refused payment by reference to Article 5 of a Law of January 11, 1947, which laid down that indemnities provided for under agreements between the Belgian, United States and British Governments should not be payable to persons to whom Belgian law denied the right of indemnification for war damage. Belgian law denied such a right to persons convicted of offences against the safety of the State and to companies which had benefited from such offences on the part of its administrators or managers. The appellant Company had, by a judgment of May 2, 1947, of the Military Court of Brussels, been found guilty of offences against the safety of the State. By a judgment dated May 5, 1954, the Court of first instance of Brussels held that Article 5 of the Law of January 11, 1947, precluded the payment of an indemnity to the appellant Company in respect of the accident of March 22, 1945. This was an appeal from that decision. It was contended on behalf of the appellant Company, first, that the accident in respect of which compensation was sought, was not an act of war; and, secondly, that the provisions of the Law of January 11, 1947, were illegal in so far as they deprived Belgian nationals of the right to compensation for tortious acts derived from Articles 1382 ff. of the Civil Code.

Held: that the appeal must be dismissed. The transport of troops on the order of a foreign Government was an act of war. The Civil Code was inapplicable to the acts of sovereignty of a foreign Power, and a right to compensation for the consequences of such acts could arise only from international agreements and from national laws enacted to give effect thereto.

The Court said: " It is not contested that the accident which caused the damage complained of occurred on March 22, 1945. . . . The British soldier who drove the truck which collided with the Packard owned by the appellant Company was on duty at the time of the accident, being engaged in driving soldiers on leave to a nearby camp. . . . The order for that transport, which was given by an allied foreign Power, undoubtedly falls within the category of acts of war legitimately carried out by an allied belligerent on Belgian territory.

" The Articles invoked by the appellant belong to internal private law and cannot apply to the consequences of the acts of sovereignty of a foreign Power, even if these are injurious to a national. A foreign Power enjoys immunity from jurisdiction when, as in this case, it acts *jure imperii*. The report of the Regent preceding the Law of December 31, 1945, emphasizes this principle of absence of responsibility, which is recognized also by the unanimity of writers and judicial decisions:

> ' It is clear that there is no civil liability when the damage is caused in the course of belligerent operations; the victims of such operations are covered only by Belgian legal provisions concerning war damage.' (*Moniteur belge*, January 10, 1946, p. 221.)

The necessary accessories of belligerent operations and acts of war properly so-called, such as the transport of troops and their supply, must be assimilated thereto, seeing that they have the same origin, namely, the sovereign authority of the belligerent Power.

"For the individual, war and any damage caused thereby constitute a scourge of which he is the victim and not an injustice for which he can seek to obtain reparation in conformity with the rules of internal civil law. It is difficult to see from whom individuals injured by acts of war could seek to obtain compensation. As far as allied belligerents who carry out operations of war on Belgian territory are concerned, the immunity from jurisdiction of foreign States acting *jure imperii* prevents their being sued in Belgian courts. Moreover, it follows from these considerations that the provisions of Belgian law invoked by the appellant Company are not applicable to damage which, as in this case, is caused by a belligerent Power acting *jure imperii*. It was the inapplicability of these provisions to compensation for damage caused by acts of war which led to the conclusion of agreements between the Belgian and Allied Governments. Thus the United States and British Governments have expressed their readiness 'to assume civil responsibility for the acts committed by their armed forces and fully to compensate the victims.'

"The principle and extent of the responsibility of the belligerent Powers for damage caused by acts of war was expressly stated by the Law of December 31, 1945, to be based not on the provisions of civil law, but on agreements concluded between the States. It may be noted that the preamble to that Law refers to the agreements of May 9 and June 26 concerning 'the compensation of damage, there defined, caused on Belgian territory by the members of the British and Allied forces under British command and by the members of the American expeditionary forces'. The Law of December 31, 1945, constitutes in internal Belgian law a measure applying the agreements entitled 'Memorandum of Agreement' and the clauses of the Protocol of August 17, 1944, concerning Mutual Aid. The 'Memorandum of Agreement' of June 5, 1945, signed by the British Government and accepted on June 26 by the Belgian Government, provides, in para. 5:

> 'Traffic accidents.—Any claim for compensation arising from a traffic accident shall be investigated and settled by the Belgian Government. In cases where the British authorities certify that the driver was not on duty at the time of the accident, the claim shall be investigated and settled by the British Government.'

"It appears from the foregoing that the Law of December 31, 1945, following on the period of reciprocal aid, does not merely, as its title suggests, lay down rules of procedure, but creates, in the form of a provision of internal law and by reference to agreements previously concluded between the Belgian State and the American and British Governments, a right for victims of acts of war to be compensated for damage caused by the American, British or allied forces under British command. It must be emphasized that, as appears from the communications exchanged between the signatory Governments, the Law of December 31, 1945, and the ' Memoranda of Agreement ' expressly laid down a right to compensation for damage caused by the allied armies; there was no previous legislation giving rise to such a right. In creating that right the law could, without abuse of power and without prejudicing acquired rights, subordinate the existence of the newly created right to conditions and restrictions considered necessary for the protection of the financial interests of the country. It does not matter whether these conditions or restrictions were contained in the law itself or in a subsequent legislative provision; until the restrictions on the necessary conditions for the existence of the right were determined, that right did not exist. Accordingly, Article 5 of the Law of January 11, 1947, in providing for an exclusion which is really the establishment of a condition essential to the existence and exercise of the new right, merely completed the provisions of this Law of December 31, 1945; it thus did not violate any right previously recognized.

" It cannot be maintained that the Law of January 11, 1947, exceeded the powers conferred on the King by the Laws of September 7, 1939, and December 14, 1944. The provisions created by the Executive were validly justified by the necessity of maintaining the credit and defending the economic and financial interests of the country. It can also not be argued that there has been a violation of Article 11 of the Belgian Constitution, which guarantees to every citizen the right not to be deprived of his property except in the public interest and in cases and in the manner established by law and subject to the payment of fair compensation. In this instance there has been no deprivation of property, but war damage; moreover, Article 11, which is a provision of internal Belgian law, cannot apply to the effects and consequences of the war and relationships arising therefrom between a Belgian citizen and a foreign State acting *jure imperii* in Belgium. . . .

" It should be added that the appellant Company has no standing to invoke agreements, to which it is not a party, signed by the Belgian, British and United States Governments in the exercise of their sovereignty with a view to compensating the victims of acts of war. These agreements between the States govern only their reciprocal relations and not the relations of one of them with the nationals of another. . . ."

[Report: *Pasicrisie Belge*, 1957, II, p. 88.]

Jurisdiction—Exemptions from—Foreign States—Acts *Jure Imperii.*

DE DECKER *v.* UNITED STATES OF AMERICA.

Belgium, Court of Appeal of Léopoldville (*Belgian Congo*).
May 29, 1956.

THE FACTS.—The appellant was employed as an assistant librarian in the United States information service from October 5, 1953, to April 12, 1954, and as such was an official of the United States Foreign Service. Upon the termination of her appointment, for budgetary reasons, she sued for compensation for breach of contract. The United States entered a plea to the jurisdiction of the Courts of the Belgian Congo. The Court of first instance of Léopoldville, by decision of October 14, 1955, held that it was incompetent to hear an action against a foreign State in respect of the performance of what must be considered to be acts of sovereignty. This was an appeal from that decision.

Held: that the appeal must be dismissed. Foreign States enjoyed immunity from jurisdiction in respect of acts of sovereignty. The termination of the appointment of an official of the Foreign Service for budgetary reasons was such an act.

The Court said: " In virtue of Article 118 of the Decree consolidated by the royal Order of December 22, 1954, concerning the Organisation of the Judiciary and its jurisdiction, the Courts of the Congo have jurisdiction over Belgian nationals and over aliens. The latter term refers not only to physical persons but also to corporate entities, amongst which foreign States must be included (*cf.* the decision of the Court of Léopoldville of November 26, 1935: *Rev. jur.*, 1936, p. 11). On the other hand, it is an international tradition, based on an idea of courtesy towards foreign sovereignty which is indispensable to good understanding between countries, and which is unanimously recognized, that foreign States, as well as their heads and their diplomatic agents, enjoy immunity from jurisdiction. That immunity used to be considered to be absolute. According to more modern ideas there are exceptions thereto, particularly where there has been express, or even tacit but regular and certain, waiver by the beneficiary, or when the beneficiary acted as a private person according to the procedure of private law.

" In this case the respondent State has not in any way waived its immunity. Not only did it enter a plea to the jurisdiction *in limine litis*, but its Ambassador in Brussels made a formal statement to that effect on July 8, 1955.

" The question of the competence of the Tribunal thus arises only with reference to the question whether in appointing the appellant and in subsequently terminating her appointment the respondent State acted as a sovereign power in the exercise of its *imperium* or whether it acted as a private person. It appears from the documents submitted to the Court, and in particular from the document entitled 'U.S.I.A. Division of Foreign Service Personnel—Personnel Action', that the relationship between the parties did not arise under a simple contract of employment, freely concluded. The appellant, no doubt at her request—or at least with her consent, since she never objected—was incorporated in the Foreign Service of the United States of America as assistant librarian in the information service of that country. In this connection it may be noted that at no time during her service from October 5, 1953, to April 12, 1954, did she claim the benefit of the provisions of the Decree of June 25, 1949, concerning contracts of employment in the Belgian Congo. The application of that Decree is not required by public international or universal policy. It is required by internal public policy, but not in respect of the sovereignty of a foreign State (*cf.* Brussels, July 17, 1938: *Journ. trib.*, March 6, 1938, No. 3525).

"In appointing the appellant as an official ('*sous statut*') and in terminating her appointment for budgetary reasons, the Government of the United States undoubtedly acted as a public authority in the exercise of its *imperium*, and not as a private person. That is so, in particular, in view of the fact that the appellant was attached to the information service, which is political in nature. The place where she was appointed, her nationality, and the relative unimportance of her functions, are irrelevant.

"Accordingly, the Court of first instance, which cannot interfere with the exercise of the sovereignty of a foreign State, correctly held that it was incompetent."

[Report: *Pasicrisie Belge*, 1957, II, p. 55.]

Jurisdiction—Exemptions from—Foreign States—Waiver of Immunity by Commencing Proceedings—Competence of Ambassador to Represent Foreign State in Proceedings—State Instrumentalities—Chinese Delegation to Allied Council for Japan as Governmental Agency of Republic of China.

REPUBLIC OF CHINA *v.* CHUKA NEWSPAPER CO., LTD., *ET AL.*

Japan, District Court of Tokyo. December 23, 1955.

(Mikio Nakagawa, President; Zenkichi Ogawa and Seiichi Hanabuchi JJ.)

THE FACTS.—The defendant, Kabushiki-Kaisha Chuka-Kokusai-Shimbun-Sha (hereinafter referred to as "the defendant Company"), a corporation established under Japanese law by Chinese nationals, was on June 1, 1950, granted a loan of 7,200,000 yen by the Delegation of the Republic of China to the Allied Council for Japan (hereinafter referred to as " the Chinese Delegation "). The defendant Lin Hei-shuo agreed to stand surety for the loan.

This was an action to recover the amount of the loan. It was brought by Mr. Tung Hsien-kuang, the Ambassador of the Republic of China to Japan, as the representative of the plaintiff Republic, against the defendant Company and Lin Hei-shuo. The defendant Company objected to the jurisdiction of the Court and to the claim of the Ambassador to represent the Republic of China, contending " that under customary international law a State cannot exercise jurisdiction over another except where the latter State expressly waives this immunity and consents to submit to the jurisdiction of a foreign court, that plaintiff gave no such express consent, and further, that there is no clear basis enabling the Ambassador, Tung Hsien-kuang, to represent the plaintiff Republic in this litigation." The defendant Company contended also that the Chinese Delegation was not a governmental agency of the Republic of China.

Held: that the objection must fail. The Court had jurisdiction seeing that the plaintiff Republic had waived its immunity by commencing the action. The Chinese Ambassador was competent to represent the Republic of China in the proceedings and it was clear that the Chinese Delegation must in the light of its history be regarded as an agency of the Republic of China.

The Court said: " Under customary international law a State is immune from the jurisdiction of foreign courts, unless it voluntarily submits to the jurisdiction of the court concerned. Such exception is generally made by a treaty or by express consent of the State concerned (*Daishin-in* (former Supreme Court) decision (*Ku*) No. 218 of December 28, 1928[1]). . . . In the instant case, plaintiff waived this privilege by appearing voluntarily before this Court. Therefore the Court may properly exercise jurisdiction over the case.

" According to Mr. Kisaburo Yokota (an expert witness), the powers delegated to the Chinese Delegation by the Republic of China may be deemed to have passed to the Ambassador of the Republic of China in Japan by the coming into effect of the Treaty of Peace between Japan and the Republic of China on August 5, 1952. . . . And where a State brings an action in a foreign court, its customary representative is its foreign envoy unless a special representative is designated for that purpose.

" According to Mr. Kisaburo Yokota, the Chinese Delegation was sent to Japan by the Republic of China to participate in the Allied Council for Japan during the occupation of that country. Although the Chinese Delegation was not sent to represent the plaintiff Government, it had been conducting various activities for

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[[1] Presumably the case of *Matsuyama and Sano* v. *The Republic of China* (7 Supreme Court Decisions 1128; *Annual Digest*, 1927–1928, Case No. 107, p. 168).]

the protection and supervision of Chinese nationals resident in Japan and their commercial affairs, and on February 13, 1951, it acted for the Republic of China in certain diplomatic matters between Japan and the Republic." The Court recognized " the Chinese Delegation as a Governmental Agency of the Republic of China " and that " the loan in question was made to protect Chinese nationals in Japan." Mr. Yokota had further testified that " the Chinese Delegation was recognized by the Supreme Commander for the Allied Powers and the Japanese Government as having diplomatic functions besides the responsibility of protecting and supervising Chinese nationals in Japan."

The Court found that " the loan made by the Chinese Delegation created a legal right in favour of plaintiff," and held that the defendant Newspaper Company and Lin Hei-shuo were jointly liable to the Government of the Republic of China as a result of the said loan.

[Report: *Japanese Annual of International Law*, No. 2 (1958), p. 138.]

NOTE.—An unusual feature of this case is that the objection to the Court's exercising jurisdiction in regard to the plaintiff was raised by the defendant.

Jurisdiction—Exemptions from—Foreign States—Immunity of Foreign Governments and Ambassadors from Suit—Submission to Jurisdiction—Waiver of Immunity—Implied Waiver—The Law of Burma.

U ZEYA *v.* THE BRITISH SECRETARY OF STATE FOR WAR.

Burma, High Court of Rangoon. February 2, 1949.

(U Tun Byu and U Aung Tha Gyaw JJ.)

THE FACTS.—The plaintiff-appellant, U Zeya, brought an action in the City Civil Court of Rangoon against the Secretary of State for War of the United Kingdom for the recovery of a sum of money as compensation for the use and occupation of a house at Rangoon after the British re-occupation of Burma, for the period from June 1, 1945, to the end of November 1946. A petition and a subsequent written statement were filed by the Assistant Director of the Claims and Hirings Department, Burma, of the British Army, contending that the Court had no jurisdiction to hear this action. The Court held that the action was not maintainable against the defendant in view of the provisions of Section 86 of the Code of Civil Procedure (which deals with immunity) and in view of the fact that Burma became an independent country from January 4, 1948.

The plaintiff appealed to the High Court, notice of appeal being served on the British Ambassador in Rangoon. On the question of the immunity from jurisdiction of the respondent, the appellant contended that the filing of the petition and the statement above mentioned constituted an implied submission by the British Secretary of State to the jurisdiction of the courts of Burma.

Held: that the appeal must be dismissed. The service of the proceedings on the British Ambassador was invalid. There was no implied submission to the jurisdiction; the Director of Claims and Hirings had no authority to represent the Government of the foreign State of Britain in the present proceedings. In any event, both the petition and the statement contained a protest to the jurisdiction of the courts of Burma.

The Court said: " It is a recognized principle of international law that a foreign Sovereign and his property are not subject to the process of a court of another country, and this exemption is also extended to the Ambassador who represents the Sovereign. . . . It is necessary to consider whether there is any provision in the law of Burma which allows a foreign Sovereign or State or the Ambassador who represents such Sovereign or State to be sued in Burma. It is clear that His Britannic Majesty's Ambassador cannot ordinarily be served with notice of an action. The purport of Section 86 of the Code of Civil Procedure is apparently to give effect to certain principles of international law.

" The contention of the plaintiff-appellant is that the City Civil Court has jurisdiction to try the action which he instituted against His Britannic Majesty's Secretary of State for War on the ground that the defendant-respondent had submitted to the jurisdiction. . . . . He contends that His Britannic Majesty's Secretary of State for War had properly been represented by Lt.-Col. E. G. Josling, who was in charge of Claims and Hirings, Burma. . . .

" The action in the present case was in reality a suit against a foreign State or Sovereign, and we do not find anything on the record to indicate that Lt.-Col. Josling was at any time capable of representing His Britannic Majesty in the action in question. He did not produce any authority which would entitle him to represent His Britannic Majesty and Lt.-Col. Josling is not a person who can be assumed to be a representative of His Britannic Majesty's Secretary of State for War. The record of the case also indicates that there was in fact no acquiescence in the jurisdiction of the Court by the defendant-respondent in the present case. Lt.-Col. Josling presented a petition dated January 27, 1948, in para. 3 of which he clearly stated that he had no authority to accept service of summons or to defend a suit on behalf of the Secretary of State for War. It is, however, argued by the plaintiff-appellant that para. 7 of the petition suggests that Lt.-Col. Josling had acquiesced in the jurisdiction of the City Civil Court, but it seems to us that para. 7 must be read with para. 3 of the petition, and when they are read together it appears to us that what Lt.-Col. Josling purported to do was [to indicate] that he was willing to have the case argued on behalf of the Secretary of State for War, if the plaintiff-appellant persisted in proceeding with the suit, to show that the Court had no jurisdiction to entertain the suit against His Britannic Majesty's Secretary of State for War. It is said that Lt.-Col. Josling in fact filed a written statement on a subsequent date which purported to be on behalf of the Secretary of State for War and that the action of Lt.-Col. Josling should be taken to indicate that the defendant-respondent had acquiesced in the jurisdiction of the City Civil Court of Rangoon. We cannot accede to this contention, even assuming that Lt.-Col. Josling had proper authority to represent the defendant in the suit, because it is clear from Clause C of para. 9 of the amended written statement that it was still being contended by Lt.-Col. Josling that the City Civil Court had no jurisdiction to entertain the suit against the Secretary of State for War. Moreover, para. 5 of the amended written statement shows clearly that Lt.-Col. Josling, who was the Assistant Director of the Claims and Hirings Department, Burma, had no authority to represent the Secretary of State for War; and para. 5 of the amended written statement is as follows: ' the defendant is not aware of the allegation contained in para. 5 of the plaint and states that in any case neither the Defence Secretary to the Government of Burma nor the Headquarters Burma Command nor the Claims and Hirings Department, Burma [are] his legal representatives in Burma. The defendant submits that the very notice served on them, even if duly served, is not legally valid as against him.'

" It must accordingly be held in the circumstances of this case that there had in fact been no acquiescence by the defendant-respondent in the jurisdiction of the City Civil Court in the present case."

[Report: 1949 B.L.R. 402.]

Jurisdiction—Exemptions from—Foreign Governments—The Law of Burma.

U Kyaw Din *v.* The British Government.

Burma, High Court of Rangoon. July 14, 1948.

(U Bo Gyi J.)

The Facts.—The plaintiff brought an action against the Government of the United Kingdom for recovery of money being the value of goods belonging to him said to have been destroyed by the British forces on the eve of the evacuation of Rangoon in 1942. When the matter came up before the Court the plaint was accepted by the Judge subject to objections (if any) by the defendants. Thereafter the Registrar (original side) sent in lieu of a summons a written intimation of the suit to His Majesty's Ambassador to the Union of Burma. The Foreign Office replied that the Ambassador declined to accept the letter substituted for a summons on the ground that no action lay in the Burmese courts against the British Government.

Held: that the action must be dismissed as the defendant enjoyed immunity from suit.

The Court (*per* U Bo Gyi J.) said: "The case has . . . been placed before me for argument as to whether this Court has jurisdiction to entertain the suit against the defendant. . . . The plaintiff contends that in view of the provisions of Sections 9 and 86 of the Civil Procedure Code the present suit lies against the defendant. But Section 9 of the Code merely mentions the nature of suits that may be instituted, and Section 86 provides that in certain circumstances, and subject to the consent of the authority concerned, suits may be instituted against a Sovereign Prince or Ruling Chief, or against an Ambassador or Envoy of a Foreign State, but makes no mention of a foreign State as being amenable to the jurisdiction of the Burmese courts. It is significant that while under Section 84 of the Civil Procedure Code a foreign State may sue in any court in the Union of Burma, there is no provision in the Code which permits the institution of an action against a foreign State.

"It would seem therefore that the authors of the Code of Civil Procedure followed the general law. There is a considerable body of weighty and unanimous authority for the view that 'although States can sue in foreign courts, they cannot as a rule be sued there, unless they voluntarily submit to the jurisdiction of the court concerned' (*International Law* by Oppenheim, 6th ed., vol. I, p. 239). This, as the learned author observes, flows from the fact that all member States of the Family of Nations are equal before international law and consequently no State can claim jurisdiction over another.

"Since the . . . defendant has refused to submit to the jurisdiction of this Court, the question that now arises is as to the course to be adopted with regard to this defendant. In this connexion the observations of Kay L.J. in *Mighell* v. *Sultan of Johore* (L.R. [1894] 1 Q.B. 149 at p. 162) are pertinent. There his Lordship observed:

> 'It is said that an independent sovereign may waive his right to immunity, and may treat himself as subject to the jurisdiction. I agree. But how is that to be done? This seems to me, in the first place, quite clear. Supposing, by way of illustration, that some well-known potentate, such as one of the great European emperors, were to be sued in a Court of this

country, and took no kind of notice of the proceeding; it would be the duty of the Court to recognize his position, and to say at once that the person cited was an independent foreign sovereign over whom it had no jurisdiction. Therefore it is not right to say that such a sovereign must come forward and assert his right. I do not think that he need. I think the Court itself would be bound to take notice of the fact that it had no jurisdiction.'

" I accordingly dismiss the suit as against the defendant."

[Report: 1948 B.L.R. 524.]

NOTE.—Compare Article 86 of the Code of Civil Procedure (India) relating to immunity of Rulers and envoys, and the relevant Indian decisions, *e.g.*, *Maharaja Bikram Kishore of Tripura* v. *The Province of Assam* ((1949), 17 Income Tax Reports, 220; *International Law Reports*, 1955, p. 64); *Bhimaji Narasu Mane* v. *Vijayasinvrao* (57 Bom. L.R. 60; *International Law Reports*, 1955, p. 67); *Thakore Saheb Khanji* v. *Gulam Rasul Chandbhal* (57 Bom. L.R. 824; *International Law Reports*, 1955, p. 253); *Indrajitsinghji* v. *Rajendrasinghji* (57 Bom. L.R. 962; *International Law Reports*, 1955, p. 244).

Jurisdiction—Exemptions from—Foreign States—Service of Process on Consul—Jurisdiction Not Thereby Acquired—The Law of the United States of America.

See p. 433 (*Oster et Al.* v. *Dominion of Canada*).

Jurisdiction—Exemptions from—Foreign States—State Instrumentalities—Officers' Club of Foreign Air Force Regarded as Instrumentality of Foreign State.

See p. 265 (*In re Hoover*).

Jurisdiction—Exemptions from—Foreign States—Departments of Foreign Government—Department of United States Army—Exemption in Respect of Contracts of Employment at Military Bases in Italy—North Atlantic Treaty, 1949—The Law of Italy.

See p. 201 (*Department of the United States Army* v. *Savellini*).

Jurisdiction—Territorial—Exemptions from—Foreign States—Embassy as Representing Foreign State—Absence of *jus standi in judicio*.

See p. 431 (*Claim against Foreign Embassy Case*).

(c) Public Ships and Other Property of Foreign States

Jurisdiction—Exemptions from—Property of Foreign States—Real and Personal Property of which Foreign State is Beneficial Owner—Property which is Not Public Property Destined for Public Use—Whether Person in whom Legal Title is Vested is Exempt from Municipal Taxation—The Law of Canada.

Fraser-Brace *et al.* v. Saint John County *et al.*

Canada, Supreme Court of New Brunswick. August 17, 1956.
(McNair C.J.)

The Facts.—By an agreement dated June 28, 1951, and modified in 1952, a group of three firms undertook in partnership by the name of Fraser-Brace Terminal Constructors (referred to herein as Fraser-Brace) to construct for the United States of America certain works in Canada in connexion with a series of radar installations forming part of a continental defence system mutually undertaken by Canada and the United States. Their construction by the United States Government was undertaken pursuant to an Agreement between it and the Government of Canada. The contract was negotiated on behalf of the United States Government by the Corps of Engineers and was signed on behalf of the United States by a member of the Corps. He and the Corps of Engineers under his command had general supervision of the operations contemplated by the contract.

The construction contract provided that " the contractor shall, in the shortest practicable time, furnish the labour, materials, tools, machinery and equipment, facilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the work ", which involved the construction in the radar chain of nine stations located in Newfoundland, Labrador and Baffin's Land. It also provided that " the amount of all foreign taxes, fees, duties and/or charges of all kinds, which may be required on account of the performance of this contract—shall be reimbursable " to the contractor.

Fraser-Brace acquired various necessary premises. In late 1951 or early in 1952, Fraser-Brace took a lease of a warehouse, which building lay partly within the City of Saint John and partly in the Parish of Simonds. In June or July 1952, substantial facilities were established in the Parish of Simonds, in pursuance of a lease dated May 29, 1952, by which Fraser-Brace obtained from a Mrs. McDonald property on which to construct the necessary buildings. The lease contained the following covenant respecting taxes:

> " (2) That the lessee shall pay promptly when due all taxes for personal property, buildings and improvements and other charges which may be payable by reason of the occupancy of the said premises by the said lessee."

It also contained a covenant against assigning or subletting without the lessor's written consent which was qualified by the following provisions:

"(10) Notwithstanding anything to the contrary herein contained, the lessor grants permission to the lessee to assign this agreement to the United States of America.

"(11) Notwithstanding anything to the contrary herein contained, the lessor grants to the lessee and to the United States of America the right of any employees of the United States Government to occupy any part of the said premises."

Fraser-Brace later obtained from one Fowler a second lease, dated February 5, 1952. It contained clauses similar to those in the McDonald lease permitting its assignment to the United States of America and granting to Fraser-Brace, the lessees, and to the United States of America the right of any employees of the latter to occupy any part of the demised premises during the term granted. It further provided that all taxes and other charges on the land itself, or on any improvements placed thereon by the lessees, should be paid by the lessees; and that any of the fixtures or structures placed on the lot should remain the property of the lessees and could be removed. On this lot Fraser-Brace erected a small building and established additional radio equipment. The application for the erection of this building was made in the name of Fraser-Brace as owner.

On or about April 1, 1954, the two main buildings were placed by the Corps of Engineers in the charge of an American Air Force establishment, which employed the New Brunswick Division of the Canadian Corps of Commissionaires to guard them, but on May 1 they became again the responsibility of the Corps of Engineers, which made a similar arrangement with the Commissionaires to guard them. On November 30, 1954, the buildings were declared by the Corps of Engineers as no longer of use to the United States Government and therefore available for disposal. As a result, they passed under the control of the Crown Assets Corporation of Canada.

Meantime, on May 1, 1954, the McDonald lease was assigned by Fraser-Brace to Drake-Merritt. While there was no similar written assignment of the Fowler lease it was disclosed that, apparently at or about the same time, Fraser-Brace transferred or released possession of the Fowler lot to Drake-Merritt. Thenceforth the latter assumed responsibility for the rent payable under both leases which as it became due was paid to the lessors and was charged to the United States Government by Drake-Merritt, who obtained reimbursement therefor under its contract. Under its contract dated February 16, 1951, Drake-Merritt undertook to construct in Canadian territory for the United States of America certain permanent defence works for joint use by the Air Forces of the United States and Canada. These works were undertaken by the United States Government under Agreements between it and the Government of Canada.

The Drake-Merritt agreement in its main features resembled the form of the Fraser-Brace contract. It contained similar provisions for procurement by the contractor of all necessary goods, materials, labour, etc. and for reimbursement by the United States Government of all outlays made by Drake-Merritt under it for goods, services, buildings, trade fixtures, temporary rights in land, taxes and local charges. In particular, the provisions respecting title or ownership of Government-furnished property and contractor-acquired property contained in Article 24 of the Fraser-Brace contract[1] were found in the Drake-Merritt contract, similarly designated as clauses (a), (b) and (c) of Article 24. The contract containing those provisions was in force on December 30, 1953, when Drake-Merritt took over from Fraser-Brace the radio facilities which had been established by the latter in the Parish of Simonds.

In the present action Fraser-Brace sought to recover from the Municipality various sums which were paid by them as taxes resulting from assessments made in 1952 and 1953. They also claimed an injunction to restrain the Municipality and its co-defendants, two of the officials of the Parish of Simonds, from collecting or attempting to collect taxes assessed against them in 1954 which were not paid. Drake-Merritt similarly claimed an injunction to restrain the collection of taxes assessed against them in 1954 and 1955 which were not paid. The plaintiffs contested the assessment on two grounds. First, they contended that they at no time had any title to, or right or interest in, such property capable of being assessed, the ownership thereof being vested in the United States of America. Secondly, they contended that the title to properties was at all times vested in the United States of America and consequently not liable to assessment, as belonging to a foreign sovereign State.

Held: that the plaintiff's claim must be rejected. (1) The United States Government had the beneficial ownership of the property, the legal title to which was vested in the plaintiffs, who were therefore properly assessed. (2) Since the United States Government had neither legal title to nor possession of the property, and since it was not possible to regard the property as the public property of the United States destined for its public use, there was no entitlement to exemption from the assessment in respect of the property.

I. *Ownership of the property.*—McNair C.J., after stating the facts, decided as a preliminary point " that all goods and chattels which, at any time, were in the possession of Fraser-Brace in the Parish [of Simonds], including all materials that went into the construction of the buildings, were purchased by them as reimbursable items under the contract. It was also clearly established [at the trial] that during their period of occupation of the lands held under the two leases Fraser-Brace were similarly reimbursed for the rents paid by them. In short all such property, including the real estate rights under the leases, was contractor acquired property" (*i.e.*, property covered by the second and third sentences of clause (b) of Article 24 of the contract entered into by Fraser-Brace). McNair C.J. then set out the assessments against Fraser-Brace, and continued:

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[1] Not here reproduced.

" The validity of these assessments, apart from the claim of sovereign immunity, is contested on the ground that the property in respect of which the various assessments were made was, while in the possession of Fraser-Brace, owned by the United States Government in whom the legal title was at all times vested.

" For reasons already given all goods and chattels brought by Fraser-Brace into the Parish of Simonds must, in my view, be regarded as contractor acquired property. The contention of the plaintiffs is that Fraser-Brace never had any title or proprietary interest in any such personal property. On analysis the position taken appears to be that by virtue of the provisions of its construction contract Fraser-Brace was the agent of the United States Government to make contracts on behalf of the latter for the purchase of goods; that the Government was a party to each such contract made by Fraser-Brace; and that, by virtue of the privity of contract existing between the vendor and the Government, the title to the goods passed on the completion of the purchase direct to the Government.

" A necessary corollary of that proposition would be that the United States Government was liable to the vendor for the price of any goods so purchased.

" To support that position counsel for the plaintiffs relied heavily upon the form of the purchase order used by Fraser-Brace in the acquisition of goods, including the general conditions incorporated in and made part of each order. Apparently all orders that went out to vendors carried a certificate of Fraser-Brace captioned ' Tax Clause ' which read:

> " ' I hereby certify that the goods herein described are being purchased on behalf of the Government of the United States for use in the Construction, Maintenance and Operation of the joint Canada-United States project " PINE TREE " and are to become and remain the property of the Government of the United States and are not for Resale, Personal or Private use, and are exempt from Sales Tax, Excise Tax and Duty by Virtue of Order-in-Council P.C. 75/5266.
>
> ' Tax exemption by the Province of New Brunswick, Department of Provisional Secretary Treasurer, Certificate of Registration No. NB-P86-11 01755.

" This tax clause was followed by a Note reading:

> " ' All invoices submitted against this purchase order must bear the following statement—" Sales Tax, Excise Tax and Duties are all excluded from the unit prices and charges of this invoice ".'

" The form of the Tax Clause certificate suggests that it was related to arrangements made between the Governments of the United States and Canada, as evidenced by the Order of the Privy Council referred to herein, whereby goods purchased for the northern projects would be exempted from Canadian taxes and duties; and that the purpose of the note appended thereto was to ensure that the vendor would not include in the price quoted any amount representing any such taxes or duties. The reference to the New Brunswick tax exemption implies that some arrangement for tax relief had also been made with the Government of this Province with respect to the so-called provincial sales tax.

" I can see nothing in the certificate to support the contention that, in placing orders for goods, Fraser-Brace was entering into a contract with the vendor in the name and on behalf of the United States Government.

" On the other hand the language of the order, including the general conditions accompanying it, tend to refute, rather than support, the plaintiff's contention. Throughout there are repeated references to ' the purchaser ', clearly meaning Fraser-Brace. Take, for instance, Condition 2 which reads:

> " ' The articles and/or services furnished hereunder are for the exclusive use of the United States Government but invoices shall be submitted *to the Purchaser* for payment in accordance with the provisions of War Department Contract.'

" And Condition 7 reads:

> " ' This order is placed for the benefit of and is assignable *by the Purchaser to the United States Government.*'

" I can find in the document nothing to indicate in any purchase privity of contract between the United States Government and the vendor, and therefore nothing to support the suggestion that by virtue of the contract of purchase and sale effected through the order the title to the goods acquired passed from the vendor to the Government. Condition 4 contains provisions of a special nature providing in certain circumstances for such a result, which but serve to strengthen the view I take of the matter.

" It is entitled ' Use of Government Bills of Lading ' and in part reads:

> " ' (a) If the seller has not refused in his bid, then at the request of the Purchaser, the seller shall make any rail shipment on Government Bills of Lading rather than Commercial Bills of Lading; said Government Bills of Lading to be furnished the seller by the Department of the Army.
>
> " ' (c) If the shipment(s) are required on Government Bills of Lading, title to the lading (shipment) shall pass to the Government F.O.B. cars at point(s) of shipment anything to the contrary herein contained notwithstanding. Such passing of title F.O.B. cars at point(s) of

shipment shall not relieve the seller of any obligations assumed or retained by him.'

" Such special provisions regulating the effect of the use of Government Bills of Lading would be unnecessary on the view advanced by the plaintiffs that on every purchase made by Fraser-Brace title to the goods acquired passed on completion of the sale direct from the vendor to the United States Government.

" There was no evidence that any of the goods in the possession of Fraser-Brace had been shipped by the vendors on Government Bills of Lading which, in any event, I am inclined to think could only be used on shipments originating and terminating in United States territory.

" The plaintiffs also rely on certain provisions of the construction contract itself as contained in clause (b) of Article 24, already quoted, which in part reads:

> " ' Title to all property purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, *shall pass to and vest in the Government* upon delivery of such property by the vendor.'

" The construction contract as a whole appears clearly to contemplate that Fraser-Brace would in their own name and on their own account purchase all required goods and materials. Apart from the effect of clause (b) it would, on a fair interpretation of the contract, seem incontrovertible that, in each transaction, the title to the acquired goods would pass from the vendor to Fraser-Brace, as purchaser, in accordance with the general principles governing the sale of goods. Were the provisions of clause (b) capable of operating so as to create the legal relationships suggested by the plaintiffs? In my view those provisions have legal effects but not such as are contended for by the plaintiffs.

" The contract must be taken as speaking *in futuro*. Clause (b) was intended to apply to goods to be acquired in the course of operations not yet begun. In my view its effect was to vest in the United States Government the beneficial ownership of all goods acquired by Fraser-Brace immediately upon their acquisition by the latter. While under the contract of purchase legal title to the goods would pass from the vendor to Fraser-Brace as purchaser, the beneficial ownership would, by virtue of the provisions of clause (b), vest in the Government when the goods came into the hands of Fraser-Brace. In other words the parties would stand in the position of trustees and *cestui que trust*, a relationship which would continue until altered through some intervening act on the part of the trustee or *cestui que trust*.

" With respect to goods so to be acquired the legal situation appears analogous to that which was under consideration in *Holroyd* v. *Marshall* (1862), 10 H.L.C. 191, 11 E.R. 999 and the observations of The Lord Chancellor (Lord Westbury) at p. 1007 appear peculiarly apposite where he says:

" ' But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract.'

" The circumstances under which the title to after-acquired property might become vested in the *cestui que trust* are well expressed by Lord Chelmsford, at p. 1008, where he says:

" ' But where future property is assigned and, after it comes into existence, possession is either delivered by the assignor or is allowed by him to be taken by the assignee, in either case there would be a " novus actus interveniens ' of the maxim of Lord Bacon, upon which Lord Campbell rested his decree, and the property would pass.'

" See also *Fraser* v. *MacPherson* (1898), 34 N.B.R. 417 in which Tuck C.J., in delivering the judgment of this Court at p. 427, after referring to *Holroyd* v. *Marshall* and *Lazarus* v. *Andrade*, 5 C.P.D. 518, said:

" ' In the former case it is held that a contract to transfer the property given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once and the vendor becomes a trustee for the vendee. The rule applies to personal property as well as to real estate. Such a contract, if made with respect to the sale or mortgage of future acquired property, being capable of specific performance, transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who may have an injunction to restrain its removal.'

" It appeared from the evidence that Fraser-Brace had, in their own name, made sales of goods which had proved surplus or were no longer required, doubtless on the instructions of the Corps of Engineers. Such action was consistent with the view I have expressed that the legal title was in Fraser-Brace; in fact it supports that view. On the other hand it appeared that certain of the goods, including the motor vehicles and certain equipment and furniture in the office building, bore the markings ' USA ', or ' USA-CE ', followed by ' FBTC ' and a serial number. It was explained that the first group of letters referred to the United States Army or the United States Army, Corps of Engineers as the case might be; while the second group referred to the contractors, Fraser-Brace

Terminal Constructors. It occurs to me that the markings were made in compliance with certain of the provisions of clause (c) of article 24 of the construction contract. In any event I fail to see in them anything to indicate, as suggested by the plaintiffs, that the legal title to the articles was vested in the United States Government any more than in Fraser-Brace; nor can their presence on the articles be construed to mean that the United States Government had vested itself with the legal title by taking over possession of those articles from Fraser-Brace, which was not the case. As stated by one of the witnesses the purpose of the markings was to identify the articles as accountable property, which, on my view of the situation, I take to mean property of which Fraser-Brace had the legal title and which, as trustee, it was holding for the United States Government in whom the beneficial interest was vested.

" It seems clear that under the Rates and Taxes Act it was proper for the Municipality, through the Board of Assessors of the Parish, to assess Fraser-Brace, as legal owner, in respect of all goods held by it in trust for the United States Government. Under Section 19 there was apparently no other course that could be taken. Subject only to any possible benefit from the sovereign immunity principle, this disposes of all assessments made against Fraser-Brace in the years 1952, 1953 and 1954 with respect to personal property which embraced all vehicles, office furniture and equipment and the inventory in the Kane's Corner warehouse.

" It may conveniently be pointed out here that, as will be indicated later in connection with the Drake-Merritt assessments, it would appear that some of the radio equipment, being that part consisting of the antennae, took on the character of fixtures and become part of the realty through attachment to the freehold. Such a conclusion would apply equally to the assessments made against Fraser-Brace. At the moment it seems sufficient to observe that, apart from the antennae, there was ample personal property, including the balance of the radio equipment, to support the assessments against Fraser-Brace, particularly as, for reasons also given later, no question of the quantum of the valuations can arise for consideration in these particular proceedings.

" As to the buildings, which were assessed against Fraser-Brace under the heading of real estate, the plaintiffs claim that they were at all times personal property. The contention appears to be that the buildings took their proprietary character from the materials out of which they were made, which came into the hands of the contractor as goods and chattels. This ignores the fact that labor, as well as goods and chattels, went into the construction of the buildings. This, however, is only material as bearing upon the question whether the buildings came within the first or second type of contractor-furnished property.

" In support of their contention that the buildings were personalty the plaintiffs rely heavily upon clause (c) of Article 24 of the construction contract which reads:

> " ' (c) Title to the Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.'

" A persual of Article 24 in its entirety indicates that the phrase ' Government property ' was used in clause (c) to include contractor acquired property as well as Government furnished property.

" While recognizing the binding effect of those provisions as between the contracting parties, I am unable to accept the view that as regards the rights of others they can be taken as controlling the operation of the general rules of law respecting fixtures.

" So far, however, as the assessments against Fraser-Brace are concerned it is, in my view, immaterial whether the buildings were, as contended by the plaintiffs, personalty or were in the nature of realty by reason of being attached to the soil. If they were personal property it was proper that they be assessed under the heading of real estate. By clause (h) of section 1 of the Rates and Taxes Act it is provided that in the Act ' real estate or real property includes land and all buildings or other things erected thereon, or belonging or affixed thereto, and also any term of years in land.' It follows that buildings not ' belonging or affixed ' to land, and therefore not fixtures, are to be assessed against the owner as, or under the heading of, real estate.

" If, on the other hand, the buildings, when erected, became fixtures and formed part of the realty their assessment in the name of Fraser-Brace as part of the realty was proper. Fraser-Brace held the legal title to a leasehold interest in the McDonald lands. It held its rights in the lands in trust for the United States Government, those rights, in my view, as already indicated, coming within the second category of contractor acquired property mentioned in clause (b) of Article 24 of the construction contract. As legal owner of this property Fraser-Brace was, under the Rates and Taxes Act, the proper person to be assessed.

" For the reasons given, I am of the opinion that, apart from the sovereign immunity claim, all assessments against Fraser-Brace were properly made and are binding in law.

" I shall now proceed to consider the validity of the assessments made against Drake-Merritt in the years 1954 and 1955. [McNair C. J. then set out the details of the assessment on Drake-Merritt, and continued:]

" None of those taxes were paid. The validity of the assessments is contested on grounds similar to those advanced by Fraser-Brace in respect of the taxes assessed against it. One is based on the claim of sovereign immunity. Apart from that, it is contended that at no time did Drake-Merritt have in any of the property in respect of which it was assessed any title or proprietary interest capable of assessment.

" For reasons shortly to be stated, it would appear that Drake-Merritt could only be assessed as the legal owner of the buildings, or of some proprietary interest in them, on the assumption that they were fixtures and therefore part of the realty, a question which must be squarely faced in this branch of the case. [McNair C.J. then examined the method of constructing each building, and continued:]

" I shall proceed now to deal with the assessments made against Drake-Merritt in respect of the buildings on the McDonald lot, under the heading of real property.

" The contention of the plaintiffs is that throughout the buildings were personalty. If that proposition is correct then, in my view, when on March 31st 1954 Fraser-Brace relinquished their occupation and control the buildings passed into the hands of the United States Government, whose agencies assumed control thereof, and became the absolute property of the Government, its former equitable title being merged in the legal ownership.

" On the hypothesis that the buildings were personalty one can only conclude that Drake-Merritt never had any title thereto, or interest therein.

" With respect to this contention the plaintiffs are faced with the fact that throughout, although claiming exemption from taxation on the various grounds hereinbefore mentioned, they acknowledged that the buildings were, in their nature, realty. This appears clear from correspondence which passed between Fraser-Brace on the one hand and the Board of Assessors and the County Solicitor respectively on the other, and from the Return of Real and Personal Property filed by Fraser-Brace in January 1954; and also from later correspondence passing between Drake-Merritt and the Assessors.

" Furthermore the assignment of lease from Fraser-Brace to Drake-Merritt contains further admissions. In it the following covenant appears:

> " ' And the assignors further covenant with the assignees that it will from time to time and at all times hereafter execute such further assurances of the leasehold premises *with the buildings and improvements* thereon as the assignees shall reasonably request.'

" The assignment bears a certificate signed by the Contracting Officer, Corps of Engineers, indicating that it had been approved by the United States Government.

" It would seem that all parties concerned acted upon the assumption that the buildings were part of the realty and as such were attached to the leasehold interest therein held in trust for the

United States Government, first by Fraser-Brace and later by Drake-Merritt.

" Without attempting to assess the effect of such admissions on the position now taken by the plaintiffs, I, for other reasons, am inclined to think that their contention that the buildings were chattels and that Drake-Merritt had no proprietary interest in them capable of assessment, even if correct, cannot avail them in this action.

" As stated the lease of the McDonald lot was on May 1st 1954 assigned to Drake-Merritt who thereby became the owner of a term of years in the lot and possessed of an interest in real estate capable of assessment. Clause (h) of s. 1 of the Rates and Taxes Act provides that in the Act ' real estate ' or ' real property ' includes, *inter alia*, ' any term of years in land.' As legal owner of the term of years Drake-Merritt was properly on the assessment rolls in 1954 and 1955 as a ratepayer owning real property in the Parish. While recognizing that the valuation placed by the assessors upon the real estate holdings of Drake-Merritt unquestionably embraced the buildings on the lot, I do not feel that in these proceedings this is a material consideration. The Act provides special machinery and statutory tribunals to deal with questions of over-valuation. If the buildings were not part of the realty then Drake-Merritt could have sought relief from the over-valuation of the real estate under the procedure provided by the Act. No question of over-valuation has been raised by the pleadings and I am altogether doubtful that such could be an issue in an action of this nature.

" While tempted to dispose of the question now under consideration on the grounds just mentioned, I shall proceed to deal with the vexed problem as to whether or not the buildings were fixtures or part of the realty.

" The plaintiffs rely mainly upon three features or incidents to support their contention that the buildings did not become fixtures when erected, being (1) the temporary use contemplated by Fraser-Brace, (2) the use of prefabricated materials in their construction and (3) the manner in which they were attached to the ground. In my view these features, taken singly or in combination, do not afford the proper test. Numerous authorities have defined the appropriate criteria, some of which I shall now consider.

" [After examining the relevant authorities, McNair C.J. concluded:]

" According to the foregoing authorities the rule to be applied may be stated thus: If it appears from the circumstances that the buildings were erected to further some established independent use of the lands or to serve some purpose incidental to operations being carried on upon the lands, as for instance mining, manufacturing, milling or like operations, and were therefore ' accessory to a matter of a personal nature ' or ' accessory to something in the nature of a personal chattel located on the land ' then the buildings are in the nature of chattels; but if the purpose of their erection were to allow, or provide for, a more complete and beneficial enjoyment of the land itself and the buildings were therefore an adjunct to the land to improve its usefulness or, as it was put, were accessory to the realty as allowing a more beneficial enjoyment of it by the occupant or were calculated to enhance the value of the premises for the purpose for which those premises are applied, then the buildings are fixtures and take on the nature of realty.

" Fraser-Brace were not carrying on upon the McDonald lot any separate or independent operations to which the buildings might be regarded as an accessory. The sole purpose that the buildings were intended to serve was to make the lands themselves useful to the occupant as its Canadian headquarters. In my view the buildings were fixtures and part of the freehold. In consequence Fraser-Brace, by reason of their proprietary interest in the lands, and later Drake-Merritt for the same reason, were liable to assessment in respect of the buildings as realty.

" Subject to the reservation respecting sovereign immunity, I therefore find that the assessments made against Drake-Merritt in respect of real property are valid and binding.

" I shall now deal with the assessments made against them in respect of radio equipment under the heading of personal property, reserving for the moment consideration of the question as to the character of the antennae, that is whether or not these were fixtures and part of the realty.

" The contention of the plaintiffs is that when the radio equipment was handed over by Fraser-Brace on December 30th 1953 it came into the possession of Drake-Merritt as Government furnished property. At that time the original construction contract of Drake-Merritt was in force. The claim is that, at the time Drake-Merritt took over the radio equipment, the United States Government was possessed of the full legal and beneficial ownership which continued to remain vested in it. With that proposition I am unable to agree.

" Up to the moment of its transfer the title to the radio equipment was held by Fraser-Brace in trust for the Government. Nothing had taken place to alter that relationship. There was no intervening act on the part of the trustee or of the *cestui que trust* constituting a surrender or abandonment by Fraser-Brace of the legal title or an assumption by the Government of the legal title. The transfer itself did not so operate. The parties to it were Fraser-Brace and Drake-Merritt. By it Fraser-Brace delivered the equipment to Drake-Merritt who, as a result, become vested with the legal ownership subject, however, to the existing trust.

" The provisions of the supplemental agreement of April 18th 1954, the so-called Modification No. 10, could not in themselves operate to change that relationship. Under Article 18 Drake-Merritt continued to hold the radio equipment as trustee for the United States Government. At no subsequent time was there any *novus actus interveniens* capable of operating to divest the former of the legal title and vest it in the latter.

" In the light of those considerations and consistently with the principles followed in dealing with the tax incidence on this equipment while in the hands of Fraser-Brace I must find that Drake-Merritt was properly assessed in respect of personal property in the year 1954.

" It seems that, in accordance with the principles applied in the reasoning whereby I have found the buildings on the McDonald lot to be fixtures, I would be forced to conclude that the antennae on this lot and the Fowler lot were also fixtures. This, however, in my view cannot affect the validity of the personal property assessments. On the basis of original cost the antennae represented about nine per cent. of the total value of the radio equipment, a mere fraction of the whole. There was ample other radio equipment, clearly not fixtures, to support the assessors' valuations on personal property which in any event are in my view, as already stated, not open to question in the present proceedings.

" Consequently I must find that the assessments made against Drake-Merritt in the years 1954 and 1955 in respect of personal property are valid and binding."

II. *Claim to Sovereign Immunity.*—" It remains only to consider the plaintiff's submission that all properties covered by the assessments were entitled to exemption from taxation as belonging to the Government of a sovereign state.

" Many authorities were cited on that point. I do not think that even on the assumption that legal title was vested in the United States Government they would support the submission made.

" The relevant principles were considered by the Supreme Court of Canada in the *Reference as to the Powers of certain Municipal Corporations to levy rates on Foreign Legations and High Commissioners' Residences*, reported in [1943] S.C.R. p. 208.[1]

" At p. 213 Chief Justice Duff quotes, with approval, a passage from the judgment of the Judicial commitee in *Chung Chi Cheung* v. *The King*, [1939] A.C. 160[2] delivered by Lord Atkin who, at pp. 167–8, says:

> ' It must always be remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity, except in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found

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[[1] See *Annual Digest*, 1941–1942, Case No. 106.]
[[2] See *Annual Digest*, 1938–1940, Case No. 87.]

it, they will treat it as incorporated into our domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.'

" At p. 215, the learned Chief Justice refers to the judgment in the celebrated case of *The Schooner Exchange* v. *McFaddon* (1912), 7 Cranch 116 delivered by Marshall C.J., (United States) where, at pp. 138–9, he says:

' The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemptions, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.'

" The principles which were applied to effect personal immunity for a foreign sovereign and his representatives have been extended in their application to embrace certain classes of property. At p. 217 the learned Chief Justice refers to the case of *Musurus Bey* v. *Gadban*, [1894] 2 Q.B. 352 (English Court of Appeal) and to the judgment therein of Davey L.J., where, at p. 361, he says:

' These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our own Courts: see, for example, the latest case of *The Parlement Belge* (1880), 5 P.D. 197, in the Court of Appeal, in which it was said . . . that as a consequence of the absolute independence of every sovereign State and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign *or* ambassador, *or over the public property of any State which is destined to its public use*, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory.'

" At p. 220 Chief Justice Duff, observing upon the reasons for, and the scope of, the immunity accorded property says:

' One of the immunities recognized by the English law, as already intimated, is the inviolability of the ambassador's residence, that is to say, of the legation. Vattel puts it this way:— (Chap. IX, p. 494, para. 117) " The independence of the ambassador would be very imperfect, and his security very precarious, if the house in which he lives were not to enjoy a perfect immunity, and to be inaccessible to the ordinary officers of justice. The ambassador might be molested under a thousand pretexts; his secrets might be discovered by searching his papers; and his person exposed to insults. Thus all the reasons which establish his independence and inviolability, concur likewise in securing the freedom of his house." '

"And at p. 221:

'Parallel with this rule touching the immunity of legations, there runs the principle of the immunity of the *property of a foreign state devoted to public use in the traditional sense.* In *The Parlement Belge* (*supra*) it was held that this immunity applies to a ship used by a foreign government in carrying mail. The Supreme Court of the United States has held that it is enjoyed by a ship, the property of a foreign sovereignty and employed by the foreign government for trading purposes. *Berizzi Brothers Co.* v. *SS. Pesaro* (1926, 271 U.S. 562).[1] It most certainly cannot be said this is settled doctrine, in view of the opinion expressed in the *Cristina* case (1938, A.C. 485)[2] although Lord Atkin, who delivered the judgment of the Judicial Committee in *Chung Chi Cheung* v. *The King* (*supra*) at p. 175 uses a general phrase:—" The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process." '

" The Supreme Court of Canada, in the case under consideration, held that the freedom of the property of a foreign sovereignty or its diplomatic representatives from legal process should extend to make it immune from local rates and taxes arising under the general provisions of a domestic statute. The question before the Court was stated by Duff C.J., at p. 222, where he says:

' The precise question we have to consider is whether a tax imposed by a statute in general terms in respect of the ownership and of the occupation of real property, or levied upon real property itself, extends to the case where such property is owned, or occupied, by a foreign state, or its diplomatic agent, and is employed for the public diplomatic purposes.'

" On this question, at p. 228, he further says:

'The general result appears to be that in England taxes and rates imposed by statute in general terms in respect of the occupation or ownership of real property are not recoverable from diplomatic agents in respect of real property occupied by them or owned by them, or their States, and occupied and used for diplomatic purposes. Such a charge creates no liability to pay, as we have seen, and it cannot, I think, consistently with principle, create any effective charge upon the property. The property is not subject to process, or to visitation by government officers; and the foundation of this privilege is that the foreign State and its ambassador are immune from coaction direct, or indirect.'

" In so disposing of the question he proceeded to point out that the immunity, arising as it does from implication, can be removed by the legislative body, having territorial jurisdiction, but only by clear and precise enactment. In the quotation from the judgment of Lord Atkin in *Chung Chi Cheung* v. *The King* (*supra*) that proposition will be noted. The learned Chief Justice on this point adopts

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[1 See *Annual Digest*, 1925–1926, Case No. 135.]

[2 *Ibid.*, 1938–1940, Case No. 86.]

the language of Marshall C.J. in the *Schooner Exchange* case where, at p. 231, the latter says:

'Without doubt the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. . . . Those general statutory provisions . . . which are descriptive of the ordinary jurisdiction . . . ought not, in the opinion of the Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.'

" The immunity accorded property used for diplomatic purposes was early extended to foreign ships of war. In *The Parlement Belge* (1880), 5 P.D. 197 it was applied to protect an unarmed packet belonging to a foreign sovereign, and in the hands of officers commissioned by him, and employed in carrying mails. The head-note, in part, reads:

'As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its Courts any of its territorial jurisdiction over *the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use* or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory.'

" In *The Porto Alexandre*, [1920] P.D. 30,[1] another decision of the English Court of Appeal, the immunity was further extended to embrace a vessel owned and operated by a foreign state and used in ordinary trading voyages carrying cargoes for private individuals for reward. It was contended, as against the claim to immunity, that it was not sufficient for a sovereign or a sovereign state to allege that a vessel is the property of such sovereign or sovereign state, and that the allegation must go further and say the vessel is employed in the public service or on public service. The Court, however, considering the question concluded by the decision in *The Parlement Belge*, found in favour of the immunity.

" As pointed out by Chief Justice Duff in the *Reference* case a similar decision was, in 1926, rendered by the Supreme Court of the United States in the case of *Berizzi Brothers* v. *SS. Pesaro* (*supra*). He also pointed out that doubt was later thrown upon the soundness of those views in the House of Lords.

" The case which he had in mind is *Compania Naviera Vascongado* v. *Steamship Cristina*, [1938] A.C. 485[2]. Lord Thankerton at p. 496 and Lord MacMillan at p. 498 alike expressed doubt upon the soundness of the decision in *The Porto Alexandre* case which, in their view, appeared to extend the application of the immunity doctrine to an extent not established as recognized by the nations under accepted rules of international law.

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[1] See *Annual Digest*, 1919–1922, Case No. 100.]

[2] *Ibid.*, 1938–1940, Case No. 86.]

"It seems beyond question that to accede to the plaintiff's contention that all the property from time to time in their possession in the Parish of Simonds was entitled to immunity would be carrying the application of the accepted principles far beyond all former limits.

"The Government of the United States had, according to my views, neither legal title to, nor possession of, the property. I find it impossible to regard it as public property of the United States which was 'destined for its public use' or 'devoted to public use in the traditional sense.' Its connection with the works being established in Northern Canada which when erected were, presumably, to become property of the United States devoted to a public use, was remote. It was for the most part, if not in its entirety, of the nature of expendable property in the hands of private contractors and used by them to carry on what were, in essence, commercial operations.

"I would repeat the words of Lord MacMillan in the *Christina* case (*supra*) where, at p. 497, he says:

'Now it is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, exidenced by international treaties and conventions, authoritative text-books, practice and judicial decisions. It is manifestly of the highest importance that the Courts of this country before they give the force of law within this realm to any doctrine of international law should be satisfied that it has the hall-marks of general assent and reciprocity.'

"No judicial decisions, binding on this Court or otherwise, have been found nor have the plaintiffs presented any other material to indicate that the doctrine of sovereign immunity has by international consensus been extended to cover matters of the nature of that under consideration. In consequence I must find against the plaintiffs on this aspect of the case.

"The result is that the plaintiffs have failed on all issues. The action will therefore be dismissed with costs."

[Report: 39 Maritime Provinces Report 33.]

NOTE.—This decision was reversed on appeal to the Supreme Court of New Brunswick, and a further appeal against this reversal was dismissed by the Supreme Court of Canada. These decisions will be reported in subsequent volumes of the *International Law Reports*.

Jurisdiction—Territorial—Exemptions from—Property of Foreign States—Proceedings to Recover Share Certificates—Conditions of Immunity—*De facto* Possession—Whether Sufficient to Establish Claim to Immunity—Necessity for Proof of Dedication to Public Use—The Law of Hong Kong.

MIDLAND INVESTMENT CO., LTD. *v.* THE BANK OF COMMUNICATIONS.

Hong Kong, Supreme Court. April 11, 1956.

(Gregg J.)

THE FACTS.—The plaintiff Company had acquired 1,643 shares in the Union Insurance Society of Canton Ltd., and the certificates relating to these shares were the subject matter of the action. The certificates were at the time of the proceedings held in the custody of the court.

The plaintiff Company had always been the registered owner of the shares; it had not in any way dealt with them, and had always received the dividends in respect of them. The share certificates had been in the safe custody of a shareholder of the plaintiff Company in Shanghai but he had no authority to dispose of them. They had nevertheless come into the hands of the defendants, and the plaintiff Company had commenced an action for their return or for damages *in lieu*.

The defendants contended that the certificates were received by them from the Bank of China, Shanghai, on behalf of the People's Government of the Republic of China, and that the certificates had lawfully come into the possession and control of the Ministry of Light Industries of the People's Republic of China. It was admitted that the defendants did not represent the People's Government of the Republic of China in the sense of being accredited representatives of that Government. The defendants now sought an order that the writ and all subsequent proceedings be set aside on the ground that the court had no jurisdiction to entertain the action as it impleaded the sovereign State of China.

The plaintiff Company alleged that the share certificates had been seized in Shanghai without justification and without their authority or consent. It was denied that the certificates had been lawfully in the possession of any department or representative of the People's Government of the Republic of China.

Held: that the application to have the writ and all subsequent proceedings set aside must fail. To establish a claim to sovereign immunity, evidence of *de facto* possession is not in itself sufficient: there must, if the claim is to succeed, be satisfactory evidence that the property is dedicated to a public use.

Gregg J., after stating the facts, continued: " On the facts and on the authorities cited by him—notably the cases of the *Porto*

Alexandre[1] and *C.A.T. Inc.* vs. *Chennault & Willauer and Others*[2]—Senior Counsel for the defendants, Mr. Chen, has contended in effect that, apart from any claim to title, he is entitled to succeed on *de facto* possession, control and direction or right to immediate possession.

" In its letters and in the admitted portions of its cable to the defendants, the Bank of China, Shanghai, makes it clear that it regards the share certificates in question as the property of the People's Republic of China; and in the letters it also makes it clear that its reason for sending the said share certificates to the defendants in Hong Kong is, *inter alia*, to obtain a transfer of ownership in the said scrip and shares. That this purpose was doomed to failure is manifest from the affidavit filed on behalf of the plaintiffs; and for this reason it is impossible for me to see any valid reason why the Bank of China should at this stage wish to continue to retain possession of the said scrip.

" It is not denied that, under British law, the plaintiffs are the registered owners of the shares of which the share certificates are simple evidence. It is not denied that the plaintiffs have, since the seizure of the scrip by the Government of the Republic of China in 1952, been in receipt of the dividends from the shares. It is not denied that the plaintiffs have, as legal owners of the said shares, been issued by the Union Insurance Society of Canton with 191 bonus shares in May of last year. And it is not denied that if the scrip were now lost or destroyed the persons who would receive new scrip in place of these would be the plaintiffs and not the Government of the Republic of China.

" Again, there can be no legal transfer of the shares without either the consent of the plaintiffs or a court order, which last would necessitate the Government of the Republic of China establishing its ownership in this Court and so submitting to this Court's jurisdiction, which it now objects to. (See Article 9 of the Articles of Association of the Union Insurance Society of Canton.)

" Thus on the evidence before me it is, to my mind, clear that, in so far as the Government of the Republic of China is concerned the share certificates in question are, to all intents and purposes, utterly useless; and will, in all probability, remain so indefinitely. Further, I am of the opinion, on the evidence adduced, that the Government of the Republic of China has not shown even a colour of right, under British law, to the possession of the said share certificates, which are not negotiable instruments and are not share warrants within the meaning of Section 73 (1) of the Companies Ordinance (Cap. 32).

" Counsel for the defendants, however, contend in effect that, under international law, *de facto* possession, regardless of how it has been obtained, is sufficient to sustain a claim to sovereign immunity. Mr. Chen, if I understand him aright, contends that acquisition by what he calls an executive act of the foreign sovereign is sufficient. Certainly no evidence has been produced of any formal decree or other Act of State under which such executive act could have been carried out or justified. Mr. Chen has referred in this connection to a seizure and confiscation of foreign-owned gold by the Hong Kong Government under the Importation and Exportation Ordinance (Cap. 50) and has tried to draw a parallel between this and the seizure in question; but it surely must be obvious that, in the latter case, the seizure and confiscation of gold is effected as a penalty specifically prescribed for a specific offence against a specific ordinance: it is not merely a seizure for no stated cause and under no stated authority.

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[1] See *Annual Digest*, 1919–1922, Case No. 100.]

[2] See *International Law Reports*, 1950, Case No. 45.]

" As regards the judgment of the Full Court of Hong Kong, previously referred to, I may say now that I do not regard this as binding on me, under the present circumstances, for the reason that, in my view, the question as to whether the property held was or was not dedicated to a public use did not fall to be fully considered.

" In the *Cristina* case,[1] which concerned a requisition by a foreign State for public purposes—and it is important to remember this throughout—it is quite evident that the decision in the *Porto Alexandre* Case [*supra*], to the effect that sovereign immunity could extend to cases where the property seized was used exclusively for trading purposes, was not regarded with approval by three of the five Lords of Appeal concerned. Lords Thankerton, MacMillan and Maugham doubted the correctness of the decision in the *Porto Alexandre* case, and the first two reserved their opinions on it, so that the decision was not then endorsed. Nonetheless, the learned Chief Justice of Hong Kong, Sir Leslie Gibson, considered, as trial Judge in the case of *C.A.T. Inc.* vs. *Chennault & Others* [*supra*], at pp. 384 *et seq.*, that the law, in this connection, was settled by the *Porto Alexandre* case.

" In commenting on this view, however, the learned President of the Full Court (Williams Acting C.J.) stated:

> ' We are disposed to consider '—[not, be it noted, we consider, but " We are disposed to consider "] ' that the learned Chief Justice was correct in the view he took but even if he were not, we think that the claim of the assets in the present case to be considered as dedicated to public purposes is far stronger than it was in any of the cases above mentioned.'[2]

Thus it is clear, to my mind, that in this case the Full Court were not particularly interested in pursuing the question of dedication to public use—and in any event were apparently well satisfied that the property in question (aeroplanes) had a strong claim to be considered as dedicated to public purposes. Incidentally it might be mentioned, as a matter of interest, that in this case, even if the plea of sovereign immunity had not been raised, the Court would not, on the merits, have granted the order of receivership sought.

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[1] See *Annual Digest*, 1938–1940, Case No. 86.]

[2] See *International Law Reports*, 1950, Case No. 45, at p. 179.]

" Senior Counsel for the plaintiffs has referred me to passages in the *Cristina* case from the judgments of Lords Thankerton, MacMillan and Maugham. Lord Thankerton at p. 493 of the report makes it clear that he regards possession for public uses as an important ingredient when he states, *inter alia*: ' I am further of the opinion that it is sufficiently established that such possession is for public uses . . .'.

" Lord Wright in the *Cristina* case at p. 506 quotes the following passage from the judgment of Brett L.J. in the *Parlement Belge* case[1] with approval:

> ' The principle to be deduced from all these cases is that as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other foreign state each and every one declines to exercise by means of its courts any territorial jurisdiction over the person of any sovereign or ambassador or over the public property of any state which is destined to public use.'

" Later in the *Cristina* case at page 519 of the Report, Lord Maugham quotes from the judgment in the case of the *Parlement Belge* which was applied in the case of *The Porto Alexandre*:

> ' The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore we are of the opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity.'

Having thus quoted, Lord Maugham proceeds:

> ' My Lords, I cannot myself doubt that, if the *Parlement Belge* had been used solely for trading purposes, the decision would have been the other way.'[2]

Then later he continues:

> ' . . . After much consideration I can only expres my own conclusion. The judgments in *The Porto Alexandre* seem to me to have omitted any consideration of what I deem to be a vital point—namely, the fact that other countries while they admit the immunity as regards ships of war and other public ships have not been at all agreed that the same immunity ought to be granted to ships and cargoes engaged in ordinary trading voyages.'[3]

Still later Lord Maugham continues:

> ' My Lords, I am far from relying merely on my own opinion as to the

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[1] (1880) 5 P.D. 197.

[[2] See *Annual Digest*, 1938–1940, Case No. 86, at p. 260.]

[[3] *Ibid.*, at pp. 260–261.]

absurdity of the position which our courts are in if they must continue to disclaim jurisdiction in relation to commercial ships owned by foreign Governments. The matter has been considered over and over again of late years by foreign jurists, by English lawyers, and by businessmen and with practical unanimity they are of opinion that if Governments, or corporations formed by them, choose to navigate and trade as shipowners, they ought to submit to the same legal remedies and actions as any other shipowner.'

" In my view, having regard not only to the above authorities but to all the relevant authorities cited by Counsel, it is necessary for the foreign sovereign, if he wishes to discharge the onus of satisfying the court that he is entitled to sovereign immunity, in a case like the present, to produce satisfactory evidence that the property seized is dedicated or destined to public use. This has not been done in the present case.

" In the case of such things as aeroplanes, the production of evidence of dedication to a public use would no doubt be a comparatively easy matter; but what evidence can be produced of dedication to a public use of scrip which is utterly useless to the foreign country that has seized it and holds it and which is merely evidence that the plaintiffs are the owners of certain specified shares—shares held by one British Company in another British Company both of which are completely outside the jurisdiction of the Republic of China.

" In my view, therefore, evidence of *de facto* possession or any other form of possession is not, under the present circumstances, sufficient by itself to establish a claim to sovereign immunity. There must, in my view, be satisfactory evidence that the property seized is dedicated to a public use.

" When Lord Atkin in the *Cristina* case stated his second principle, *i.e.*, ' that they [the Courts] will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property of which he is in possession or control ', he (Lord Atkin) had clearly in mind property requisitioned for public purposes and of which the sovereign had possession and control for such purposes.

" It has never been laid down as an absolute rule of law that under no circumstances may a foreign sovereign State be impleaded; and, having regard to the judgments in the *Cristina* case, there is, in my opinion, strong ground for holding that, in cases like the present, evidence of dedication to public uses must be adduced. In this case, as I have said, there is no such evidence; and, on this ground, I dismiss the present application."

[Report: 40 Hong Kong Law Reports, p. 42.]

(d) Foreign Armed Forces

Jurisdiction—Exemptions from—Foreign Armed Forces—Violation of Criminal Law of Receiving State—Absence of Immunity from Jurisdiction of Receiving State.

Cozart *et al.* v. Wilson *et al.*

United States, Court of Appeals, District of Columbia Circuit.
July 12, 1956.
Supreme Court. November 5, 1956.

The Facts.—This was a petition for a writ of habeas corpus by three United States citizens, members of the armed forces of that country stationed in Japan. The petitioner Cozart was awaiting trial by a Japanese court for causing a death by negligent operation of an automobile. He would normally have been returned to the United States in January 1956. The other petitioners had been convicted of rape by a Japanese court but were to be retried, as Japanese law permitted, because the prosecution was dissatisfied with the suspended sentences of two and three years that were imposed. These convicted petitioners were being held in the armed forces and in Japan after their enlistments expired. The District Court held that it had jurisdiction of the petition for habeas corpus, but dismissed the petition.

On appeal,

Held (by the Court of Appeals): that the dismissal of the petition for writ of habeas corpus must be affirmed. The petitioners were sufficiently restrained for the purposes of habeas corpus, and the District Court accordingly had jurisdiction of the petition. Members of the armed forces of a sending State were not immune from the jurisdiction of the courts of the receiving State, in the absence of a cession of jurisdiction to the sending State.

The Court said: " We agree with the District Court that it had jurisdiction of the petition for habeas corpus. We decided in *Eisentrager* v. *Forrestal*, 1949, 84 U.S. App. D.C. 396, 174 F 2d 961,[1] that persons held by the United States Army in Germany could maintain habeas corpus proceedings in the District of Columbia. In that respect the *Eisentrager* case has not been overruled. The Supreme Court reversed our judgment, but on other grounds. *Johnson* v. *Eisentrager*, 1950, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255.[1] We afterwards assumed the presence of jurisdiction, in accordance with the *Eisentrager* principle, in *Rubenstein* v. *Wilson*, 1954, 94 U.S.App.D.C. 152, 212 F.2d 631. Since the petitioners are not at liberty to leave Japan, or to move about freely within Japan, they are sufficiently restrained for the purposes of habeas corpus.

[[1] See *Annual Digest*, 1949, Case No. 153.]

Lynch v. *Hershey*, 93 U.S.App.D.C. 177, 208 F.2d 523, is not to the contrary. That case involved a selective service registrant who had been ordered to report for induction but was not, as the present petitioners are, under actual military control.

"In *Kinsella* v. *Krueger*, 76 S.Ct. 886, 891, the Supreme Court said, citing *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 136, 3 L.Ed. 287: '. . . under the principles of international law each nation has jurisdiction of the offenses committed within its own territory.' Dicta in the *Schooner Exchange* case and other early cases suggested that these principles do not apply to members of our armed forces abroad, but these dicta are now entitled to no weight because they cannot be reconciled with the Court's opinion in the *Krueger* case. In *Krueger* the Court sustained a murder conviction by an American court-martial in Japan, but did so on the ground that Japan, at the time of the offense, had ceded to the United States jurisdiction of such offenses. Since Japan has not, either at the time of the offenses with which the present petitioners are charged or at any later time, ceded to the United States jurisdiction of these offenses, Japan has jurisdiction to try the petitioners and might hold them in jail pending trial. They do not and cannot complain because they are not so strictly confined. The petition for the writ of habeas corpus was rightly dismissed." [Reports: 98 App. D. C. 437; 236 F. 2d 732.]

On petition for writ of *certiorari*,

Held (by the Supreme Court *per curiam*): that the petition for writ of *certiorari* must be granted, the judgment of the Court of Appeals vacated, and the case remanded to the District Court with directions to dismiss the petition for writ of habeas corpus upon the ground that the cause had become moot.

[Reports: 352 U.S. 884, 77 Sup. St. 126, 1 L.Ed. 2d 82.]

NOTE.—The above case is noted in *Georgetown Law Journal*, 45 (1957), 512.

See *Wilson et Al.* v. *Girard*, 354 U.S. 524 (1957), to be reported in the *International Law Reports* for 1957.

Jurisdiction—Exemptions from—Visiting Foreign Armed Forces—Crimes Committed by—Jurisdiction under Treaty—Waiver of—Individuals—Standing to Claim Under Treaty—Executive Agreement—The Law of the United States of America.

UNITED STATES *v.* COPELAND *ET AL.*

United States, Board of Review, Office of the Judge Advocate General of the Air Force.

March 28, 1956.

THE FACTS.—The accused, members of the United States Air Force stationed in Libya, were charged with violation of Article 120 (rape and carnal knowledge) of the United States Uniform Code of Military Justice (64 Stat. 140, 50 U.S.C. § 714). They had been apprehended by the Libyan police and released to the United States military authorities for trial by court-martial. Formal consent to this exercise of jurisdiction by the United States was obtained from the Libyan Government only after completion of the trial.

The accused were found guilty, and appealed. They asserted errors of municipal law in the proceedings of the court-martial and contended that the court-martial was without jurisdiction because the trial was completed before the Libyan Government had been allowed to exercise its right to jurisdiction, as required by Article XX of the Agreement between the United States and the Government of the United Kingdom of Libya, signed at Benghazi, Libya, on September 9, 1954 (5 U.S.T. 2449, T.I.A.S. No. 3107) (the so-called " Base Rights Agreement "). That Article provides in part:

> " (2) In other cases the Libyan courts shall exercise jurisdiction unless the Government of the United Kingdom of Libya waives its right to exercise jurisdiction. The Government of the United Kingdom of Libya will give sympathetic consideration to any request from the United States authorities for a waiver of its rights in cases where the United States authorities consider such waiver to be of particular importance, or where suitable punishment can be applied by disciplinary action without recourse to a court."

The accused asserted that the Agreement restricted the jurisdiction of United States military tribunals by creating exclusive jurisdiction in the Libyan courts unless and until a waiver of Libyan jurisdiction was obtained.

On appeal,

Held: that the findings and sentence of the court-martial must be affirmed. Under international law, when members of the armed forces of a nation were quartered within the territory of a friendly nation with the consent of the sovereign, jurisdiction over offences committed by such forces within that territory was retained by the visiting sovereign unless it was expressly waived. The Base Rights Agreement did not constitute such a waiver but created concurrent jurisdiction in the Libyan courts and United States military tribunals in the class of cases to which it applied. Any right to demand prosecution in the Libyan courts rested in the Government of Libya and could not be asserted by an individual defendant. Furthermore, the Constitution and laws of the United States were the supreme law of that nation and could not be altered or superseded by an executive agreement, such as the Base Rights Agreement, which did not attain the dignity of a treaty.

After discussing various issues of municipal law, the Court said:

" The appellate defense counsel assigns as error:

> " ' The court erred in permitting the trial to be held prior to exercise of their right to jurisdiction of the Libyan Government.'

" As near as we are able to ascertain it, the assignment is that the so-called Base Rights Agreement, dated 9 September 1954 [T.I.A.S. 3107], provides that the Libyan civil government ' may . . . exercise [its] right to jurisdiction, prior to that conferred upon military authority ' of the United States, in those cases which are of ' grave public concern ' to the Libyan government, which it is said this case was. It is said: ' The court-martial was completed prior to the date that the Libyan government accepted or rejected jurisdiction in the matter as provided . . .' in the Agreement mentioned. It is concluded: ' Therefore the court had no jurisdiction *ab initio*.'

" We assume that the trial herein was held prior to the time the Libyan government accepted or rejected the exercise of jurisdiction; and we notice that it appears that the Libyan government was a friendly foreign power.

" The contention is essentially a two-phased attack on court-martial jurisdiction, viz.

(a) as to the person of accused and
(b) as to the place of its exercise.

" In this case there can be no question but that if the court-martial had jurisdiction over accused's person, and at the place of its exercise, it had jurisdiction over the offense charged—rape as denounced by Article 120 of the Uniform Code of Military Justice. . . .

" Whether or not international law is an authority of greater power or magnitude, the assignment of error can find no support within the accepted rules of its jurisprudence. In fact the applicable accepted rule of international law on the subject lays the foundation for annihilation of the argument advanced. Paragraph 12, pages 16 and 17 of the Manual for Courts-Martial, 1951, provides:

> ' Under international law, jurisdiction over members of the United States or other sovereign who commit offenses in the territory of a

friendly foreign state in which the visiting armed force is by consent quartered or in passage remains in the visiting sovereign. This is an incident of sovereignty which may be waived by the visiting sovereign and is not a right of the individual concerned.'

" These rules find unqualified support in *Schooner Exchange* v. *M'Faddon*, 7 Cranch, 116 (1812), 3 L.ed. 287; *Coleman* v. *Tennessee* 97 U.S. 509 (1879), 24 L.ed. 1118–1122; *Dow* v. *Johnson*, 100 U.S. 158, 165, 25 L.ed. 632; *Tucker* v. *Alexandroff*, 183 U.S. 423, 424, 46 L.ed. 224, 22 Sup. Ct. 195; and *U.S.* v. *Weiman and Czertok*, (No. 1403), 3 U.S.C.M.A. 216, 11 C.M.R. 216,[1] and cases cited. Consequently, the court-martial of the United States which tried the accused had, not only constitutional and statutory authority to do so, but the authority of an accepted rule of international law.

" However, the rule of international law declares that there may be a waiver of (the exercise of) such jurisdiction at such a place. But, there was no waiver by the United States. Without deciding whether this waiver may be made, not only by the legislative power, but also by the executive power, the very fact that the accused were tried by a United States court-martial, acting pursuant to the supreme law of the land aforesaid, would seem to indicate that there was no waiver.

" However, the appellate defense counsel would have us say that the waiver is found in the United States-Libyan Base Rights Agreement, more properly entitled the ' Agreement between the Government of the United States of America and the Government of the United Kingdom of Libya ' signed at Benghazi, Libya, 9 September 1954 [T.I.A.S. 3107]. In detail we have examined that Agreement, together with the applicable Memorandum of Understanding implementing it and bearing the same date; but we are constrained to say that we find no waiver, within its terms, of the right of the United States to try by its court-martial members of the armed forces of the United States who are in Libya, regardless of the crime committed and whether or not the crime is one of ' grave public concern ' to the Governmant of Libya, such as this one is said to have been considered by the Government of Libya. The Agreement and the Memorandum of Understanding do reflect an express Libyan waiver of, or agreement to waive, jurisdiction over members of the armed forces of the United States, in certain cases; but neither the waiver nor the agreement to waive is made reciprocal. Likewise the Agreement does contain a provision that, in certain cases, members of the armed forces of the United States in Libya shall be ' immune ' from the jurisdiction of the Libyan courts; but neither is this immunity made reciprocal. It reasonably appears that this failure to waive, and to grant immunity from, United States court-martial jurisdiction was intentional, and hence we conclude that no grant of immunity can be implied. Nor are we able to find

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[[1] See *International Law Reports*, 1953, p. 182.]

in the documents any provision, express or implied, to the effect that the United States will not *exercise* jurisdiction through its court-martial until the Libyan Government has first ' accepted or rejected jurisdiction in the matter,' as claimed. From all that appears from the documents, both governments had jurisdiction and the right to exercise it in this case. It is said in *U. S. ex rel. Demarois* v. *Farrell*, 18 F. 2d 957, 962:

' When a person has violated the criminal statutes of two different sovereigns, it is for the interested sovereigns and not the criminal to settle which shall first inflict punishment.' (See and *cf. U.S. ex rel. Moore* v. *Traeger*, 44 F.2d 312, 314 (C.C.A. 9); *Ponzi* v. *Fessenden*, 258 U.S. 254, 42 Sup. Ct. 309, 66 L.ed. 607, 22 A.L.R. 879).

" The United States has made no agreement as to who shall *first* exercise jurisdiction in Libya in cases of this kind (See and *cf.* A.C.M. 8708, Buxton and Roy, 16 C.M.R. 732, 746; A.C.M. 9602, Rubenstein, 19 C.M.R. 709). On the other hand, it appears that the broad tenor of the Agreement and Memorandum of Understanding contemplates that the United States, not only *has* court-martial jurisdiction, but that it is not prohibited from exercising it in the first instance (See *U.S.* v. *Weiman and Czertok, supra*).

" The above assumes that the Agreement and the Memorandum of Understanding were of such a character that they would supersede Articles 1 (1) and 5 of the Uniform Code of Military Justice, if they conflicted therewith. We have pointed out that there is no conflict. However, even if there were, it would not appear that there could be any such supersession; for the documents are not treaties—which are one form of the supreme law of the land under Article VI of the Constitution—but executive agreements which do not rise to that stature. Executive agreements cannot take away jurisdiction which is conferred by valid acts of Congress (*Perlstein* v. *U.S.*, 57 F.Supp 123, 126 (D.C. Pa. 1944); *U.S.* v. *Capps*, 204 F.2d 655 (C.C.A. 4, 1953)).[1] For all of the reasons aforesaid, we can find no basis to conclude that the court-martial did not have the necessary jurisdiction. The assignment or error is not sustainable. . . . "

[Report: 21 C.M.R. 838. Petition for review by the United States Court of Military Appeals denied, 7 U.S.C.M.A. 781, 22 C.M.R. 331.]

NOTE.—Although a Board of Review within the Office of the Judge Advocate General is not a court *stricto sensu*, it is an appellate tribunal. It is provided by statute that these boards, constituted in the offices of the Judge Advocates General of the three services, are to review the actions of courts-martial in certain categories of cases. There is then a right of appeal to the Court of Military Appeals in a more limited group of cases. The Board of Review is, in substance if not in name, an intermediate appellate tribunal between the court-martial and the Court of Military Appeals.

[[1] See *International Law Reports*, 1953, p. 412.]

Jurisdiction—Immunity from—Foreign Armed Forces—Crimes Committed by Employee of—Immunity under International Agreement—United States National Employed by Contractor Working for United States Armed Forces in Japan—The Law of the United States of America.

UNITED STATES *v.* BURNEY.

United States, Court of Military Appeals. March 30, 1956.

THE FACTS.—The accused, a United States citizen who worked for a private corporation, was employed in the maintenance of technical equipment at a United States Air Force base in Japan. He resided and worked on the Base, was supervised by military personnel, and was afforded all the privileges of the base facilities ordinarily reserved to military personnel. While on the base, he unintentionally aimed and discharged a revolver at a co-worker and severely wounded him.

The accused was convicted by a court-martial of a violation of Article 128 (Assault) of the United States Uniform Code of Military Justice (64 Stat. 141, 50 U.S.C. § 722). The conviction was affirmed by a military Board of Review.

The Court of Military Appeals granted a petition for review on the question of the jurisdiction of a court-martial to try a United States civilian " serving with, employed by, or accompanying the armed forces " for a crime committed outside the United States. Jurisdiction in such cases was conferred upon military tribunals by Article 2 (11) of the Uniform Code of Military Justice (64 Stat. 109, 50 U.S.C. § 552), which provides:

> " The following persons are subject to this code: . . .
>
> " (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States . . ."

On petition for review, the accused contended that, as a matter of municipal law, a statute which allowed trial of a United States civilian under military law—which does not afford indictment by a grand jury or trial by jury—is in violation of the Fifth and Sixth Amendments to the United States Constitution and therefore invalid.

Held: that the decision of the Board of Review must be affirmed The accused was subject to the jurisdiction of a court-martial under Article 2 (11) of the Uniform Code of Military Justice as one " serving with " or " accompanying " the Armed Forces. That provision of law was not constitutionally objectionable.

The accused was a member of the " civilian component ", exclusive jurisdiction over whom had been vested in the United States by Article XVII of the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan. If the United States were to be unable to exercise the jurisdiction so accorded it, it would be necessary to turn members of the " civilian component " over to the courts of Japan to be tried. The accused would more probably be accorded constitutional safeguards in a trial by court-martial than in one by a Japanese court. The obstacles which lay in the way of a trial of the accused in the United States would make legislation permitting such proceedings impracticable.

In a detailed opinion, largely devoted to the constitutional issues, the Court said with regard to the international aspects of the case:

" . . . Let us suppose, for the purpose of argument, that offenses by civilians in foreign lands would not simply be ignored, and that some sort of prosecution would be attempted. Having in mind that we are considering only overseas personnel, should we, of all judges, force any American citizen, civilian or military, into a foreign court? Consideration must be given to this matter, for if these civilians cannot be tried by American military courts under American standards, then the host country will, in many instances, take over the prosecution. Some discussion of that unpalatable alternative is in order.

" On July 15, 1953, the United States Senate ratified the Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty, 99 Cong. Rec. 8837–38 (July 15, 1953), T.I.A.S. 2846. Article VII of this Agreement, commonly known as the NATO Status of Forces Agreement, provides in part as follows (99 Cong. Rec. 8724 *et seq.*, July 14, 1953):

> ' 1. Subject to the provisions of this Article,
>
> (*a*) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;
>
> (*b*) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.'

" Other pertinent provisions are to the effect that the military authorities of the sending State have the primary right to exercise jurisdiction over a member of its forces or its civilian component whenever the offense is solely against its property or security, or solely against the person or property of another member of that force or a civilian component or dependent, or where the offense arises out of any act or omission done in the performance of official duty. Article VII, § 3 (*c*), *supra*. It follows, therefore, that if United States civilians who accompany, serve with, or are employed by, the armed forces overseas are not subject to military law, they are subject only to the jurisdiction of the foreign State. At the very least, that nation is free to prosecute if the military jurisdiction is not to be exercised. Under those circumstances, it answers no useful end to speak of making punishable in United States Federal courts local offenses committed overseas by United States civilians. The receiving State simply need not, and undoubtedly will not, permit them to go beyond its territorial limits. Thus the worst fears of the opponents of the Treaty will be realized, 99 Cong. Rec. 4659 (May 7, 1953), 99 *id.* at 8735 (July 14, 1953), and the basic premise of its proponents undermined. 99 Cong. Rec. 8762–8769 (July 14, 1953). As will be seen, much the same situation is presented by our relations with Japan.

"On February 18, 1952, the United States and Japan entered into the Administrative Agreement Under Article III of the Security Treaty Between the United States of America and Japan, T.I.A.S. 2492, February 28, 1952, Article XVII of that Agreement[1] provides, in pertinent part:

> '. . . the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. Such jurisdiction may in any case be waived by the United States.
>
> 'The United States undertakes that the United States service courts and authorities shall be willing and able to try and, on conviction, to punish all offenses against the laws of Japan which members of the United States armed forces, civilian component, and their dependents may be alleged on sufficient evidence to have committed in Japan, and to investigate and deal appropriately with any alleged offense committed by members of the United States armed forces, the civilian component, and their dependents, which may be brought to their notice by Japanese authorities or which they may find to have taken place. The United States further undertakes to notify the Japanese authorities of the disposition made by United States service courts of all cases arising under this paragraph. The United States shall give sympathetic consideration to a request from Japanese authorities for a waiver of its jurisdiction in cases arising under this paragraph where the Japanese Government considers such waiver to be of particular importance. Upon such waiver, Japan may exercise its own jurisdiction.'

"Once again, it is clear that the parties intended the United States to have the primary right to exercise jurisdiction over United States civilians present with our armed forces in Japan.

[[1] No longer in force. Superseded by Protocol to Amend Article XVIII of the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan, signed at Tokyo on September 29, 1953 (4 U.S.T. 1846, T.I.A.S. No. 2848).]

Similarly, trial by military tribunal was contemplated. Surely then, if the military authorities have no constitutional right to exercise this jurisdiction, trial will be had, for any major crime, in a Japanese court. True enough, the record does not establish that assault with a dangerous weapon is recognized as an offense by Japanese law. But we have no doubt that at least something similar could be found within its penal code. Moreover, expanding the rule beyond this case, most of the offenses committed would find their way into Japanese courts as they no doubt would be of such a character as to offend against that nation's law. Trial in a foreign court, then, is the true alternative to court-martial jurisdiction.

" The previous argument is no mere makeweight. It was the intent of founders of our Constitution to insure basic guarantees of due process to each citizen. Treaties are the law of the land as well as statutes, and surely Congress and the Executive have not done anything inconsistent with that intent by providing trial by military tribunal for civilians overseas, for Constitutional safeguards are far more likely to be extended to United States citizens in a trial by court-martial than in a trial in a foreign court. The courts of foreign sovereigns, expecially in civil law countries, are bound to follow traditions which are foreign to American standards of due process of law. Far better it is for an American accused to be tried by American court-martial, where he is entitled to representation, liberal rules of evidence, a presumption of innocence, and thorough review, than to be brought before a French, or Japanese, or German, or Moroccan, or even English civil court. In addition, because we are a nation of civilian soldiers, sailors, and airmen, many of the persons who now serve as court-martial members are the selfsame individuals who previously served on grand and petit juries, and their views of justice do not change with their garb.

" We think we may safely assert that American citizens would prefer trial by an American court-martial to a proceeding in a foreign tribunal, if their wishes were to be given any consideration in the matter. Certainly that statement is true if any lesson can be drawn from the desires voiced by American servicemen overseas. In the Congressional Record, February 20, 1956, page A1552, we find the following:

' Congressman FRANK J. BECKER, New York, visited American servicemen imprisoned in foreign jails. He concluded that the protection of the United States Constitution has been taken away from these citizens serving us overseas by the Status of Forces Treaty. These are the GI's who have been tried and convicted in foreign courts and are now serving sentences in foreign prisons.

' Those imprisoned in France and England were visited. All the GI's in England said that they would have preferred to be tried by Army or Air Force court martial. They felt that they would have had a much fairer trial and would have preferred to have an American officer defend them, even it they would have received more severe penalties from United

States authorities. This was the rule before the Status of Forces Treaty. ' In France, a man is guilty until proven innocent; under our Constitution a man is presumed innocent and must be proven guilty. All but one GI would have preferred the court martial to prosecution in the French courts. Their trials were conducted in French; in two cases the French lawyers could not speak English.'

" In disposing of this issue, we cannot fail to comment on one obstacle which renders impracticable the trial of Americans after their return to American soil, for offenses against foreign local law. If criminal law cannot be enforced expeditiously, it loses its deterrent effect. If it cannot be enforced at all, it fails entirely. Although American citizens domiciled or resident abroad are subject to subpoena by American civil courts, *Blackmer* v. *United States*,[1] . . . no one supposes that foreign witnesses residing in their native land are amenable to the process of United States courts. They cannot be compelled to appear and testify, and depositions, when they can be used, are of little, if any, value. Rule 15, Federal Rules of Criminal Procedure, 18 U.S.C. An accused is usually at a disadvantage and the Government benefited if the prosecution of the crime can be held at a great distance from the point of commission. The founding fathers must have believed in that concept, for in their efforts to protect an accused, they required that he should be tried by an impartial jury of the State and district wherein the crime was committed. If, as some people suggest, Congress could provide or has provided for prosecution at accused's point of return to this country, 18 U.S.C. § 3238, we feel secure in our belief that, in many instances, he would be without friends, witnesses, or counsel who could effectively assist him in collecting evidence. In other instances, the Government, in all probability, would be handicapped by the unavailability of witnesses. Of course, Congress could make offenses committed overseas by civilians punishable in Federal district courts, but such an enactment would have little practical utility. Must the Service transport the accused and all the witnesses back to the United States? Or, must the prosecution await the return of the military forces to this country? In this case, the accused could be returned to the United States by his employer or by the Government. Next, the victim and the other civilian eyewitness could probably be compelled, by subpoena, to give up their employment. Their way to the United States and return could be paid for them. And they could be compelled to testify against the accused. The Air Force could be required to relieve the five other witnesses from their assignments, transport them to the United States, and maintain them in readiness to testify. But surely such a system would entail tremendous expense, fantastic waste, cumbersome procedures, and interminable delay. More than that, such a scheme of operation would never be used, so long as the receiving

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[[1] See *Annual Digest*, 1931–1932, Case No. 92.]

nation stands ready to prosecute. The reader is referred to the facts of the case of *United States* v. *Smith*, 5 U.S.C.M.A. 314, 17 C.M.R. 314; see *Krueger* v. *Kinsella*, *supra*. An indispensable witness to that prosecution for premeditated murder was a Japanese maid. Could her deposition be used by the Government? Not according to law. Rule 15, Federal Rules of Criminal Procedure, supra. Assuming that Japan would consent to a removal of the accused from its jurisdiction, is it seriously contended that the maid would be subject to the compulsory process of a local district court? Congress apparently gave consideration to many of the obstacles suggested above, and concluded it would be impracticable to require trial in the United States, for it provided another method of procedure which permits trial on foreign shores. We are sure it did not exceed its powers in so doing and that the Government is entitled to its verdict in this case.

" When the problem is considered in all of its aspects, a holding in favor of jurisdiction is demanded by constitutional construction, Congressional amendment, and Supreme Court precedent. Accordingly, the decision of the board of review is affirmed."

[Reports: 6 U.S.C.M.A. 776; 21 C.M.R. 98.]

Note.—The effect of *Reid* v. *Covert*, 354 U.S. 1, 1 L.Ed. 2d 1148, 77 Sup. Ct. 1222 (1957) (to be reported in the *International Law Reports* for 1957) has been to cast grave doubt upon the accuracy of the conclusions of the Court of Military Appeals on the constitutional issues in the case reported above. In *Reid* v. *Covert* the Supreme Court of the United States held Article 2 (11) of the Uniform Code of Military Justice unconstitutional as applied to the trial by court-martial on a capital charge of a civilian dependent of a member of the Armed Forces serving overseas.

The *Burney* Case has been reported as illustrative of the views widely held by courts of the United States prior to *Covert*. Military jurisdiction over civilian employees of the United States Armed Forces in Japan had been upheld in *United States* v. *Mallow*, 7 U.S.C.M.A. 116, 21 C.M.R. 242 (1956); and in *United States* v. *Varney*, 7 U.S.C.M.A. 163, 21 C.M.R. 289 (1956), petition for habeas corpus dismissed *sub nom. In re Petition of Varney*, 141 F.Supp. 190 (S.D. Calif. 1956). In *United States* v. *Robertson*, 6 U.S.C.M.A. 805, 21 C.M.R. 127 (1956), military jurisdiction was held to have been correctly asserted over a merchant seaman; and in *United States* v. *St. Clair*, 7 U.S.C.M.A. 82, 21 C.M.R. 208 (1956), there had been a like holding as to a civilian dependent of a member of the Armed Forces serving overseas.

Jurisdiction—Foreign Armed Forces—Course Conducted by North Atlantic Treaty Organization—Aircraft Pilots from N.A.T.O. Countries—Claim in Respect of Damage Caused by Negligence of Pilots—Whether Pilots are Servants of the Crown—Whether Crown Responsible for Damage—The Law of Canada.

DAROWANY *ET AL. v.* THE QUEEN.

Canada, Exchequer Court. January 13, 1956.

(Thorson J.)

THE FACTS.—In this petition of right the suppliants were the owners of a mink ranch near a village called Gimli. Situated a few miles away was an aircraft base and training station operated by the Royal Canadian Air Force. The suppliants alleged that during the whelping seasons of 1951, 1952 and 1953, aircraft from the Gimli base flew over their ranch and terrified the minks causing the loss of many of the newly-born mink kittens. It was alleged that the loss of kittens thus caused was the result of negligence on the part of the pilots or other operators of the low-flying aircraft while acting within the scope of their employment. The aircraft in question were flown by students undergoing instruction at courses conducted for the North Atlantic Treaty Organization, the pilots being nationals of the United Kingdom, France, Belgium, The Netherlands, Norway and Italy, as well as Canadian pilots.

Held: that the petition of right must be disallowed. The pilots, not being members of the Royal Canadian Air Force, were not persons for whose conduct the Crown was responsible except in virtue of legislation which did not come into force until after the events of which complaint was made.

Thorson J. said: "The claim is made under s. 19 (1) (c) of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended in 1938, which reads as follows:

> '19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> '(c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment; . . .'

and under s. 50A of the said Act, as enacted in 1943 by s. 1, S. of C. 1943-44, c. 25, as amended by s. 7, S. of C. 1951, 2nd Session, c. 7, reading as follows:

> '50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine

> hundred and thirty-eight, a member of the naval, army or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown '.

and also under s. 3 (1) (a) of the Crown Liability Act, S. of C 1952–53, c. 30, which reads as follows:

> ' 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
> (a) in respect of a tort committed by a servant of the Crown, or . . . '

for the period after May 14, 1953, when this provision came into force.

" It is established that in a claim under s. 19 (1) (c) of the Exchequer Court Act the onus of proof that the claim is within the ambit of the section lies on the suppliant. He must establish that every condition of liability prescribed by the section has been met. Thus the suppliants in the present case must prove that some officer or servant of the Crown was guilty of negligence, that such negligence occurred while the officer or servant was acting within the scope of his duties or employment and that the losses of mink kittens of which the suppliants complain resulted from such negligence. If the suppliants fail to discharge the onus of proof that the law casts on them in respect of any of these matters their claim falls.

" It is also established that the liability of the Crown under this section is only a vicarious one and that before it can be engaged it must appear that some officer or servant of the Crown would himself have been personally liable if he had been sued: *vide The King* v. *Anthony*[1] where Rand J., delivering the majority judgment of the Supreme Court of Canada, said:

> ' I think it must be taken that what paragraph (c) does is to create a liability against the Crown through negligence under the rule of *respondeat superior*, and not to impose duties on the Crown in favour of subjects: *The King* v. *Dubois*;[2] *Salmo Investments Ltd.* v. *The King*.[3] It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.'

Thus if the facts would not support a cause of action against some individual servant or servants of the Crown, there cannot be a valid claim against the Crown.

" In my opinion, the law in this respect is the same under s. 3 (1) (a) of the Crown Liability Act as under s. 19 (1) (c) of the Exchequer Court Act. In each case the liability of the Crown is vicarious only and the onus of proof that the conditions of liability fixed by the statute are present rests on the suppliant."

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[1] [1946] S.C.R. 569 at 571.
[2] [1935] S.C.R. 378 at 394 and 398.
[3] [1940] S.C.R. 263 at 272 and 273.

Thorson J. then reviewed the evidence and expressed himself satisfied that in the whelping seasons of 1951, 1952 and 1953, planes from the Gimli base frequently flew at low altitudes and engaged in aerobatics near and over the suppliants' mink ranch, and continued: "Unfortunately for the suppliants, there is, in my opinion, an insuperable obstacle in their way. Even if it could be shown that the pilots of the low-flying planes were guilty of negligence and that the losses of which the suppliants complain resulted therefrom, the suppliants' claim would fail for they did not prove that the pilots of the low-flying planes that caused the losses were officers or servants of the Crown. It was disclosed during the trial that the pilots of the planes flying from the R.C.A.F. station near Gimli were students undergoing flying instruction at a school for North Atlantic Treaty Organization (NATO) pilots conducted by the Royal Canadian Air Force at its Gimli station. They came from various countries that were members of the North Atlantic Treaty Organization. Thus there were students from the United Kingdom, France, Belgium, Norway, The Netherlands and Italy as well as from Canada. These students were the nationals of the countries from which they came. Thus, even if the students who were not Canadians were subject to the discipline of the school, they were not members of the air forces of Her Majesty in right of Canada within the meaning of s. 50A of the Exchequer Court Act and its successor and could not, therefore, in the absence of appropriate legislation, be deemed to be servants of the Crown. The difficulty involved in this fact was realized by Parliament when it enacted The Visiting Forces (North Atlantic Treaty) Act, S. of C. 1951, 2nd Session, c. 28. S. 16 of this Act provided as follows:

> '16. For the purposes of paragraph (c) of subsection one of section nineteen of the Exchequer Court Act, negligence in Canada of a member of a visiting force while acting within the scope of his duties or employment shall be deemed to be negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.'

The Act referred to was assented to on December 21, 1951, but s. 28 provided:

> '28. This Act or any portion thereof shall come into force on a day or days to be fixed by Proclamation of the Governor in Council.'

S. 16 did not come into force until September 27, 1953: *vide Canada Gazette*, vol. 87, October 10, 1953, at pages 2957 and 2958; so that the suppliants cannot avail themselves of this statutory provision in respect of their claims for losses incurred in 1951, 1952 and 1953. There is the further interesting fact, which is not material to this case, that when s. 16 of The Visiting Forces Act came into force by proclamation on September 27, 1953, s. 19 (1) (c) of the Exchequer Court Act, to which it specifically referred, was no longer in existence, it having been repealed by s-s. (2) of s. 25 of the Crown Liability Act on May 14, 1953. This Act also provided in advance for the repeal of paragraph (c) of s-s. (1) of s. 18 of the Exchequer Court Act, R.S.C. 1952, c. 98, upon its coming into force which occurred on September 15, 1953.

" Thus there was the anomalous situation that when s. 16 of The Visiting Forces Act came into force it referred to a statutory provision that was no longer in existence and it was, therefore, of no effect. This was recognized by Parliament when it enacted the Canadian Forces Act, 1954, S. of C. 1953–1954, c. 13. S. 17 of that Act repealed s. 16 of the Visiting Forces (North Atlantic Treaty) Act and substituted therefor a section which read in part as follows:

> ' 16. For the purpose of subsection (1) of section 3 of the Crown Liability Act
>
> (a) a tort committed by a member of a visiting force while acting within the scope of his duties or employment shall be deemed to have been committed by a servant of the Crown while acting within the scope of his duties or employment; . . . '

The Canadian Forces Act, 1954, was assented to on March 4, 1954, so that it was not until that date that the Crown became liable for a tort committed by a member of a visiting force. This state of the law puts the suppliants in a difficult position. If the low flying was negligent and if such negligence was the cause of the suppliants' losses they must, if they are to succeed, prove that the negligent low flying was done by pilots for whose negligence the Crown is responsible, that is to say, by pilots who were members of the Royal Canadian Air Force. This they have not done. If the actionable low flying was by pilots who were not members of the Royal Canadian Air Force, as might be the case if there was any actionable low flying at all, the Crown is not responsible for it. It is responsible only for the negligence or torts of its own servants. Nor, in the absence of proof, will the Court assume any actionable low flying on the part of Canadian pilots.

" It may appear, at first glance, that this is a narrow ground for disallowing the suppliants' claims but it must be kept in mind that claims against the Crown under s. 19 (1) (c) of the Exchequer Court Act or 3 (1) (a) of the Crown Liability Act are statutory and would not exist apart from the statute by which liability was imposed upon the Crown. Consequently, it has been consistently held, ever since liability was first imposed on the Crown, that the requirements of the statute by which it was imposed must be strictly met in every particular before the liability of the Crown could be engaged. The review of the cases by the Supreme Court of Canada in *The King*

v. *Dubois*[1] and by this Court in *McArthur* v. *The King*,[2] demonstrates this beyond dispute. And it is also settled that compliance with the requirements of the statute must be shown by proof and that conjecture or surmise cannot take its place: *vide The King* v. *Moreau*;[3] *Ginn et Al.* v. *The King*.[4] Thus since the suppliants have not proved that the low flying which they claim was the cause of their losses was done by persons for whose acts the Crown is responsible they have failed to establish one of the conditions of the Crown's liability and have thus failed to discharge the onus which the law casts on them. On this ground alone, their claim must fail."

Thorson J. then considered the evidence of damage, and held that some of the losses alleged did result from negligent low flying of planes from the Gimli base over the suppliants' ranch, which would, were it not for the basis on which the claim had already been disallowed, justify an award of damages against the Crown.

[Report: [1956] Ex. C.R. 340.]

Jurisdiction—Exemptions from—Members of Visiting Forces—N.A.T.O. Status of Forces Agreement of June 19, 1951—Host State's Primary Right of Jurisdiction in Certain Cases—Waiver of —What Constitutes Waiver—Whether Waiver Absolute or Conditional on Trial by Sending State—Meaning of " Trial "—The Law of France.

WHITLEY *v.* AITCHISON.

France, Court of Appeal of Paris. May 16, 1956.

THE FACTS.—Article VII (3) (b) of the N.A.T.O. Status of Forces Agreement of June 19, 1951, provides that in the case of offences not arising out of acts done in the performance of the official duty of a member of a visiting force " the authorities of the receiving State shall have the primary right to exercise jurisdiction." Article VII (8) of the Agreement provides that " where an accused has been tried by the authorities of one contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party."

On November 25, 1953, the appellant, a major in the United States Air Force stationed in France under the provisions of the North Atlantic Treaty, was driving his car at high speed along a road within the judicial district of the French town of Corbeil. He was carrying as a passenger one Aitchison, an officer in the Royal

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[1] [1935] S.C.R. 378.
[2] [1943] Ex. C.R. 77.
[3] [1950] S.C.R. 18 at 24.
[4] [1950] Ex. C.R. 208 at 216.

Canadian Air Force. As subsequently found, the appellant drove negligently and as a result of his negligent driving the car crashed and Aitchison was killed. It was also found that when driving the car the appellant was not acting in the performance of his official duty, and in accordance with Article VII (3) (b) of the Agreement of June 19, 1951, the primary right of jurisdiction was vested in the French courts. The United States military authorities requested the French authorities to waive their primary right of jurisdiction, and this request was approved by the French Ministry of Justice on December 30, 1953, and granted in pursuance of such approval by the prosecutor of the Court of Corbeil on January 7, 1954. Notwithstanding the waiver of their right of primary jurisdiction by the French authorities, the widow of Aitchison, the respondent herein, instituted proceedings against the appellant for damages before the Court of Corbeil on January 19, 1954, in order to safeguard her rights and, if need be, to comply with the time-limits prescribed by French law. When the respondent brought her action for damages as "*partie civile*", as is customary in French law where criminal proceedings arising out of the same facts may also be instituted, the United States military authorities had not yet made any decision as to the manner in which they intended to proceed against the appellant in the exercise of the right of jurisdiction granted to them by the French authorities. Subsequently, the United States military authorities decided not to take any action against the appellant. The latter now objected to the jurisdiction of the French courts on the ground that the waiver by the French authorities of their primary right of jurisdiction was irrevocable and that the right once waived could not be revived by the decision of the United States authorities not to prosecute.

Held: that the appellant's objection must be overruled. A decision by the military authorities of the sending State not to proceed against a member of their forces was not a "trial" within the meaning of Article VII (8) of the Status of Forces Agreement and did not therefore preclude the courts of the receiving State from again assuming their right of jurisdiction, notwithstanding the previous waiver of that right in favour of the sending State. The appeal against the decision of the Court of Corbeil which had declared itself competent, must accordingly be dismissed.

The Court said: "The Court of Corbeil, by judgment dated April 5, 1954, sentenced Whitley to a fine of 50,000 francs for the 'involuntary homicide' of Aitchison and awarded the plaintiff (his widow) the sum of 11 million francs by way of damages. On November 25, 1953, the accused Whitley, a major in the United States Air Force, was driving in a personal capacity from Paris to Fontainebleau when the car he was driving crashed against a tree. Aitchison, a major in the Royal Canadian Air Force, who was a passenger in his car, sustained severe injuries from which he died. In accordance with the provisions of the London Agreement of June 19, 1951, ratified by France and the United States, the authorities of Whitley's home State requested the French authorities not to proceed. In pursuance of this request the Minister of Justice informed the United States authorities on December 30, 1953, that he had decided not to proceed. On January 7, 1954, the prosecutor attached to the Court of Corbeil, in whose judicial district the accident had occurred, informed the commanding officer of the United States Headquarters Air Base Group at Orly that he had agreed not to prosecute. On January 19, 1954, Aitchison's widow brought proceedings for involuntary homicide against Whitley before the Court of Corbeil sitting as a criminal court (*statuant en matière correctionnelle*). That Court rejected the accused's plea to the jurisdiction, declared itself competent and gave the judgment referred to above. Whitley in his appeal puts forward the same contention as in the court of first instance and objects to the jurisdiction. According to him the French waiver of the right to prosecute, which resulted from the transfer of the right to exercise jurisdiction by the French to the American authorities, is irrevocable. He further says that this waiver precludes any subsequent right of the receiving State to exercise jurisdiction, and that as it is unconditional it cannot be affected by a decision of the home State; and that the decision of the American authorities not to prosecute cannot revive the competence of the French Court. He accordingly submits that the action of Aitchison's widow is inadmissible.

" The Agreement [of June 19, 1951] expressly leaves the right of jurisdiction vested in the receiving State, either exclusively in respect of certain offences referred to in Article VII (2), or concurrently with the sending State in all other cases. It is clear, therefore, that the receiving State retains the right to exercise primary jurisdiction, subject only to waiver at the request of the sending State. The fact that the Contracting Parties provided only for waiver of the right of primary jurisdiction but not for waiver of competence as such demonstrates the intentional limitation of such waiver, which is waiver of the primary right, and not waiver of the right to exercise jurisdiction. Furthermore, such waiver cannot be regarded as irrevocable and unconditional. It follows *a contrario* from Article VII (8) of the Agreement that the accused can be tried if he has not been tried by the authorities of one of the Contracting Parties or, in the event of conviction, even if he has not served, or is not serving, his sentence, unless he has been pardoned. The waiver, in order to become final and irrevocable and binding upon everybody, is conditional upon a binding judgment having been passed upon the accused. It cannot therefore be regarded as bringing about, from the moment of its acceptance by the receiving State, a modification of the rules of procedure. It is only a simple agreement between the Contracting Parties to secure a better administration of justice and does not by itself affect the legal rights of the parties to the action. It follows that the right of the victim to invoke the jurisdiction in order to obtain redress for the damage suffered remains in being and cannot be denied. The right to take action to apply criminal sanctions is vested only in the officials to whom it has been entrusted by law. The Minister of Justice who notified the United States authorities that he waived the right of primary jurisdiction does not take part in launching prosecutions, and neither the spirit nor the wording of the Agreement indicates that the Agreement gives him any such right. He could not, therefore, deprive the prosecuting authorities of the right to launch prosecutions conferred on them by law. Thus the public prosecutor, by letter dated January 7, 1954, thought it his duty to notify the American authorities of the identical decision made by him. This decision amounted to no more than the transmission of documents to enable the United States authorities to arrive at a decision. The public prosecutor whose duty it is to launch prosecutions cannot divest himself of his functions. If he attempted to divest himself of his rights such action would be without legal effect. The action taken by the Minister of Justice and the public prosecutor, and the waiver by both of their right of primary jurisdiction, cannot deprive the civil claimant of her rights, which are conferred upon her by Article 182 of the *Code d'instruction criminelle*. Even if such waiver could be regarded as a prerogative of the State and as an act of State extending beyond the confines of private law, which reaches into the realm of public international law and might therefore be binding on the parties and the courts, it would still be secondary only and, in order to become irrevocable, conditional upon a judicial determination of the case of the accused. Aitchison's widow, in order to safeguard her rights, was therefore entitled to take proceedings against Whitley before the Court of Corbeil on January 19, 1954, and that Court was entitled to deal with the question of competence and the merits of the case and to award damages on April 13, 1954. At the latter date, notwithstanding that more than three months had elapsed since the date of transmission of documents to the American authorities, no decision of a jurisdictional nature, such as would have been necessary to preclude subsequent prosecution, had been taken. The United States authorities had not even informed the French authorities, in accordance with Article VII (6) (b) of the Agreement, of their intention to refer the matter to their own courts, although they had been informed by the public prosecutor of Corbeil of the steps taken by Aitchison's widow. It cannot be deduced from the wording of the Agreement that waiver of the primary right of jurisdiction must lead to an adjournment of adjudication until the State which has become the beneficiary of the primary right of jurisdiction has made a decision in the matter. In fact, such an adjournment, without any limitation of time other than that depending on the unilateral wish of one of the parties, might lead to a real denial of justice and might gravely prejudice the interests of the victim in a case—as is possible in theory—where the courts of the first State are not appealed to before the expiration of the time-limit within which a prosecution has to be initiated. In the present case it has not been established that Whitley's case had been the subject of a decision of a judicial nature when the judgment under appeal was given. In fact, such a decision can only be given by an authority which is entitled to decide not to prosecute, to release or to convict. This right cannot be conceded to an American officer of high rank who took the decision to classify the case, whatever the importance of his functions and the authority appertaining to those functions. As the Court of first instance has rightly pointed out, even according to the United States Military Code neither the recommendation as to classification made by the officer in charge of the investigation, nor the decision of the commanding officer to accept that recommendation, can constitute decisions involving an acquittal. This decision cannot, therfore, be regarded as a judicial decision, notwithstanding the care undoubtedly bestowed on the examination of the facts of the case. It follows that Major Whitley cannot be regarded as having been tried within the meaning of Article VII (8) of the Agreement. Thus the condition requiring the French courts to suspend the exercise of their jurisdiction has not been satisfied. Lastly, Aitchison's widow, in accordance with the submission made to the Court, discontinued her action because she had been indemnified within the limits of the sum insured by the defendant, ' subject '—as she says—' to an *ex gratia* application which it is proposed to make to the American authorities.' It cannot be said that the payment which she has received is ' entirely satisfactory ' within the meaning of Article VIII (6) (D) of the Agreement. That payment, therefore, cannot be regarded as precluding the action brought against the defendant. Moreover, no payment had been made at the time when the action was brought. In these circumstances, the Court is entitled to deal with the merits of the case."

The Court then considered the facts summarized in the headnote (*supra*) and arrived at the conclusion that Aitchison's death was due to the negligence of Whitley and that the judgment of the Court of Corbeil must be affirmed. The Court took official notice of the fact that Aitchison's widow had decided not to pursue the action.

[Report: *Revue Critique de Droit International Privé*, 1957, p. 100.]

Jurisdiction—Immunity from—Foreign Armed Forces—Status of —United States Defence Force in Iceland—Obligation to Pay Royalties in Respect of Musical Performances.

S.T.E.F. *v.* MINISTER OF FINANCE AND OFFICER COMMANDING THE U.S. DEFENCE FORCE AT KEFLAVIK.

Iceland, Town Court of Reykjavik. November 7, 1956.

(Arnalds, City Magistrate.)

THE FACTS.—This was an action brought by S.T.E.F. (Samband Tónskálda og Eigenda Flutningsréttar), the Icelandic Association of Composers and Performing Rights, on behalf of four composers, against the Minister of Finance (representing the Treasury) and the Officer Commanding the United States Defence Force stationed at Keflavik Airport, Iceland. The plaintiff Association claimed damages for non-payment by the Defence Force of royalties in respect of musical works produced by the four composers and broadcast by the Defence Force from the broadcasting station at Keflavik Airport operated by the Defence Force.

The United States Defence Force in Iceland had operated the broadcasting station since November 1, 1951, formal permission having been given by the Icelandic authorities on May 1, 1952; the broadcasts from the station could be heard in the south-west part of Iceland. The plaintiff had repeatedly claimed royalties from the Defence Force's representatives for the broadcasting station's musical performances, but these claims had never been acceded to, the answer always being that the matter was under consideration. In December 1943, the Board of Directors of S.T.E.F. informed the Commander of the Defence Force in a telegram that the Defence Force was strictly forbidden to perform in the broadcasting station any of the compositions for which the plaintiff held the agency. The broadcasting station's programme was then limited for a time, but shortly thereafter it reverted to its previous practice.

On March 6, 1955, the broadcasting station transmitted works by three of the composers and on March 10, 1955, it transmitted a work of the fourth composer for whom the plaintiff Association acted. All these works were performed without the plaintiff Association's permission being sought for their performance, and without royalties being paid or offered.

The plaintiff Association contended that they had the agency in Iceland for the composers and owners of performing rights of these works, and that the agency included the right to permit the performance of the works and to collect royalties therefor, as well as to bring an action arising from their unauthorized performance. By performing the aforementioned works without permission and without payment, it was contended, the Defence Force had violated the provisions of Icelandic law respecting performing rights, and under Article 19 of Law No. 13 of October 13, 1905, the unauthorized public performance of protected musical works was a ground for claiming damages The Icelandic Treasury was made a defendant because it was provided by para. 2 of Article 2 of Appendix 2 to Law No. 110 of 1951 that Iceland would pay claims, other than contractual claims, arising from acts committed by members of the United States Force resulting in a loss of property owned by persons or institutions in Iceland. Moreover, it was contended, the liability of the Icelandic State resulted from the fact that it had concluded an agreement permitting the presence in Iceland of the Defence Force. It followed therefore that the State was bound to compensate individuals for any infringement of legally protected interests which might result from the presence in the country of the Defence Force.

The first defendant (the Minister of Finance) lodged a formal defence only. The second defendant (the Commander of the Airport) contended in the first place that he ought not to have been made a party to the action. The provisions of para. 2 of Annex 2 to Law No. 110 of 1951 related only to acts committed by individual members of the Defence Force and not to acts committed by the Defence Force generally or by its Commander. He contended that the purpose of this provision was to secure the right of a private individual to a remedy for the tortious acts of members of the Defence Force in a case where the identity of the person committing the tort might remain unknown. A secondary purpose of the provisions was to facilitate the presentation of claims by individuals suffering a loss, who were enabled to bring them before the courts of Iceland. Finally, the defendant contended that the provisions were special rules, to be interpreted restrictively.

The second defendant contended also that the broadcasting of the aforementioned compositions was allowed without permission and payment, seeing that the broadcasting station in question did not charge any payment for its transmissions, and that the station was only intended to reach a comparatively small number of persons, *i.e.*, the United States military force and its staff at Keflavik Airport. The defendant supported his argument by citing the provisions of para. 2 of Article 2 of Law No. 49 of 1943, which read as follows:

> " Individual poems, stories, essays and chapters from essays, as well as individual tunes and parts from compositions which have been published, may be performed without any charge at meetings held for the purpose of charity, or for the sole purpose of expressing the national culture, or for strictly social entertainment, no payment being made for the performance; as well as at meetings of societies of schools, no payment being made for the performance and the charge for admission not being higher than the actual expenses. Dance tunes may be played without charge at such meetings, even

though a musician charges a customary fee, unless a union-bound [band] or a permanent band plays."

As regards one of the composers, who was of United States nationality and who is hereinafter called " the American composer ", the defendant disputed the plaintiff Association's agency or authority to lodge claims arising from the performance of his works. In this regard the plaintiff Association filed an agreement, concluded on April 7, 1950, with the American Society of Composers, Authors and Publishers (A.S.C.A.P.), which was a society in the United States similar to S.T.E.F. in Iceland, vesting in the plaintiff Association the agency in Iceland in connection with the public performance of its members' compositions in any conceivable way, in so far as the society had a right over the compositions. The plaintiff Association, for its part, undertook to collect royalties for the performances. This agreement was to be valid until December 31, 1951, and its validity had been extended until December 31, 1956. It was admitted that the composer in question was a member of A.S.C.A.P.

It appeared that in 1943 A.S.C.A.P. and other similar societies granted to the United States War Department permission to send abroad and broadcast in any conceivable way and without remuneration programmes intended for the entertainment and information of United States forces anywhere. Moreover, in 1950 the Board of Directors of A.S.C.A.P. wrote a letter to the President of the United States which contained, *inter alia*, the following:

> " On behalf of the American Society of Composers, Authors and Publishers, I am directed to express to you the Society's readiness to offer its service to the Nation in this hour of crisis. . . . The Society is happy to make freely available its extensive repertory of musical compositions to the Government and its Armed Services as it did in the last war, without profit to the composers, authors or publishers, for the duration of the present crisis. . . . "

In a letter dated July 31, 1950, to the Chairman of the Board of Directors of A.S.C.A.P. the President thanked him for the offer contained in the letter, and said that what the Society had done was particularly pleasing to him.

In a letter dated March 9, 1956, from A.S.C.A.P. to the plaintiff Association, the Society stated that its permission given in 1950 was limited to the crisis in Korea. The Society considered it obvious that that crisis had passed. Furthermore, it doubted whether the Government of the United States regarded the presence of a United States military force in Iceland as being connected with the crisis mentioned.

Held: that the claim must fail as regards the works of the American composer, but must succeed as regards the works of the other three composers.

The Court said: " [*General responsibility for the broadcasts.—*]

In Article 1 of Annex 2 it is stated that the words ' United States Force ' in the Annex cover members of the United States military force and staff accompanying the military force in its service. Then it is stated in para. 2 of Article 12 of the Annex that the Article does not cover actions by a United States Force in battle. It appears clear from these provisions that it is not right to exclude the Defence Force generally, or its Commanders, from the rules in para. 2 of Article 12 of the Annex, and it is undisputed that the operation of the broadcasting station in question is the responsibility of the Commander of the Defence Force. Defendant's argument therefore has no foundation in fact.

" [The plaintiff Association] is a party covered directly by para. 2 of Article 12 of the above-mentioned Annex, as it may be assumed that its interests are affected whenever rights owned by its principals in this country are affected. It does not therefore seem to be a condition for the provisions of Article 12 coming into force that the foreign parties owning interests in this country, affected here by the Defence Force, should be residents of this country: *cf.* provisions of para. 3 of the Article.

" Having regard to this, the arguments [of the defendant] will not be upheld.

" It is known that the United States military force at Keflavik Airport and its staff are fairly numerous and scattered over rather a large area. Also, the above-named broadcasting station reaches a number of Icelanders, and it is understood that they listen a fair amount to the station's broadcasts, even though not intended for them. It is true that the station does not charge any fees for its transmissions, but their nature is such, and they reach such an indefinite number of people, that they can in no way be compared with the performance covered by the provisions [of Law No. 49 of 1943] quoted. This argument of the defendant therefore has no foundation in fact either.

" It is undisputed that plaintiff holds the agency for the composers [other than the American composer], and also that those parties are subjects of States signatory of the Berne Convention, and since Iceland is also a party to this Convention they therefore enjoy the same right in this country for their creative works as Icelandic composers. As previously stated, compositions by these three parties were performed without authority in the Defence Force's broadcasting station, and the member of the Defence Force responsible for the operation of the station has therefore by this act violated the provisions of Article 19 of Law No. 13 of 1903, and defendant is liable for payment of damages therefor: *cf.* provisions in para. 2 of Article 12 of Annex 2. Damages for the unauthorized performance of compositions by those three parties are in the circumstances considered suitably fixed at kr. 800.00 to each of them individually, or a total of kr. 2,400.00."

" [*The performing rights in the work of the American composer.*]—In A.S.C.A.P.'s and the President's letters no particular mention is made of a crisis in Korea, but only of a crisis at the time the letter was written, and it is not for this Court to judge whether the crisis referred to in the letters has passed. And as it does not transpire that A.S.C.A.P. has formally cancelled its aforementioned permission of 1950 [and in view of the defendant's contentions], it must be held that the plaintiff Association has not proved that it is authorized to lodge claims on behalf of the American composer in respect of the Defence Force's performance of his work. Defendant is therefore under no liability in respect of the works of the named [American] composer."

[Report: Unpublished.]

Jurisdiction—Immunity from—Foreign Armed Forces—Jurisdiction of Receiving State in Respect of Acts Done Outside Official Duty—United States Troops in Japan—Administrative Agreement under Security Treaty of 1952—Whether Application of Agreement Involves Constitutional Provision Relating to Treaties.

JAPAN *v.* CHENEY.

Japan, Supreme Court. March 3, 1955.

(Toshiro Irie, President; Yusuke Saito, Takeshi Mano and Saburo Iwamatsu JJ.)

THE FACTS.—Cheney, a sergeant of the United States Army stationed in Japan, was charged with breaking into a private house and injuring a woman while attempting to commit rape. The offence was alleged to have been committed while Cheney was on patrol duty.

The Kyoto District Court assumed jurisdiction under Article XVII (3) of the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan of February 28, 1952 (as amended by a Protocol taking effect on October 29, 1953), which provides:

> " In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> " (a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to (i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent; (ii) offenses arising out of any act or omission done in the performance of official duty."

The accused was found guilty under Articles 130 and 181 of the

Criminal Code. He appealed to the Osaka High Court, which upheld the conviction. He now appealed to the Supreme Court.

On his behalf, it was contended that the trial Court had improperly interpreted the provision " offenses arising out of any act or omission done in the performance of official duty " in paragraph 3 (a) (ii) of Article XVII of the Administrative Agreement and that the Court's exercise of jurisdiction over the offences committed by the accused therefore constituted a violation of paragraph 2 of Article 98 of the Constitution.[1]

Held: that the appeal must be dismissed. The Court of first instance had jurisdiction because the act in respect of which the accused was convicted was of a personal nature and did not come within the terms of the Administrative Agreement.

The Court said: " The Supreme Court considers that the Court of first instance was right in holding that the provision ' in the performance of official duty ' in Paragraph 3 (a) (ii) of Article XVII of the Administrative Agreement should be interpreted to mean ' in the course of the performance of official duty ', rather than ' during the hours of official duty '; and, as applied to the instant case, the act of the accused, even though performed during the hours of his official duty, was of a private nature independent of his official duty, and it therefore did not constitute an offense ' arising out of any act or omission done in the performance of official duty '."

As regards the question of Article 98 of the Constitution, the Court said: " Interpretation of the Administrative Agreement only was involved; the appeal concerned the application of the Administrative Agreement and did not raise a constitutional question."

[Report: *Japanese Annual of International Law*, No. 2 (1958), p. 136.]

Jurisdiction—Exemptions from—Foreign Armed Forces—Secretary of Officers' Club at Base of Foreign Air Force—Officers' Club Regarded as Instrumentality of Foreign State—Waiver of Immunity—Necessity for Waiver to be Clearly Manifested.

In re HOOVER.

Japan, District Court of Aomori. February 14, 1956.

(Seiji Miyamoto, President; Seiji Nakajima and Sanae Nakata JJ.)

THE FACTS.—Lieutenant Colonel Donald D. Hoover, of the United States Air Force, was Secretary of the Officers' Club at the

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[1] The Constitution of Japan (promulgated on November 3, 1946). Article 98 provides (in part): " The treaties concluded by Japan and the established law of nations shall be faithfully observed."

Air Force Base, Misawa, Japan. On October 20, 1954, he discharged Tomizo Yukawa, who was employed at the Mess as a cook. Yukawa filed an application with the Aomori Prefectural Local Labor Relations Board for a decree of redress rescinding the discharge and ordering the payment of wages for the period of discharge up to the time of reinstatement to his former position, on the ground of violation of Article 7, para. 1, of the Labor Union Law (Law No. 51 of 1954), which forbade discharge of workers for any reason relating to membership of a trade union. In reply to the complaint, Hoover stated that he had not known that Yukawa was engaged in trade union activities; he had dismissed the man for incompetence in his work. The Board found for the complainant and issued the following decree for redress:

> " Respondent shall rescind the discharge order of 20 October 1954 against Tomizo Yukawa, reinstall him in his former position and pay him the sum of money equivalent to the wages due to him from the day of the alleged discharge until the time when he shall have been reinstated to his former position."

Hoover failed to comply with the decree for redress, and the Board, considering that he should be fined under Article 32 of the Labor Union Law, so informed the Aomori District Court in accordance with Article 27, para. 9, of that Law.

Held: that no fine could be levied on Hoover, who was the representative of the United States of America, an independent foreign State, over whom the Court had no jurisdiction.

The Court said: " It is apparent that [Lt.-Col. Hoover] held his position not as an employer in a private capacity but as the representative of the Officers' Club (which is not, however, regarded as a juridical person) at an Air Force Base.

" For an employer to be a party in a case of complaint for redress for unfair labor practice under the terms of Article 27 of the Labor Union Law, he must be a contractual employer and it is a reasonable interpretation of that expression that it does not include a person responsible for the management who may have actually committed an act of unfair labor practice on behalf of the employer. According to this interpretation, the person or party punishable under Article 32 of the said Law for failure to abide by the decree for redress must be the employer. As it is clear that [Lt.-Col. Hoover] is not an employer in the above sense it must be declared that he is not punishable under Article 32 of the Labor Union Law.

" The Officers' Club at Misawa Air Force Base is an officers' open mess established in accordance with Article 176–II of the United States Air Force Regulations (A.F.R.) and may, in the eyes of the laws of the United States, be considered as one of the instrumentalities of the so-called non-appropriated funds, and the various instrumentalities of the said funds are the instrumentalities of the

Federal Government of the United States to be established and supervised by the Commanding Officer concerned in accordance with the regulations established by the Secretary of the Air (Army) Force (and they do not have the status of a judicial person under the laws of the several States nor of the District of Columbia). It is stipulated that they are to enjoy all the immunities and special privileges which are accorded to each Department and Agency of the Federal Government of the United States under the Constitution and laws of that country.

" That being the case, it becomes necessary to consider whether the Officers' Club itself should be held penally responsible. It has already been mentioned that the Officers' Club in the present case is, in the eyes of the laws of the United States, an instrumentality of the Federal Government, and the question whether such a Government instrumentality can or cannot be subjected to a fine rests upon the question whether Japan has or has not jurisdiction over the United States itself. Obviously, it is an established fundamental principle in international law that, except where a State voluntarily submits itself to the jurisdiction of foreign courts and in a few other special cases, a State is not subject to the jurisdiction of foreign courts. Therefore, it is reasonable to consider that the Japanese courts, unless it is otherwise agreed by treaties or consent is given in certain individual cases, cannot exercise jurisdiction to impose a fine, as in the present case, upon the United States of America. There is no provision in the Administrative Agreement under Article III of the Security Treaty [of 1952] between the United States of America and Japan (hereinafter referred to as the Administrative Agreement) which warrants the conclusion of any arrangements to such an effect. (The Administrative Agreement provides for criminal jurisdiction in Article 17 and for civil jurisdiction in Article 18; in neither case is there any provision which sufficiently warrants the exercise of jurisdiction by Japan to the extent of imposing fines upon the United States). Although Article 18 provides for jurisdiction over civil cases, the consensus of opinion is that the provision of paragraph 7 of the said Article cannot be interpreted to mean that the United States has agreed to submit itself to the jurisdiction of the Japanese courts. In view of these facts, this Court can come to no other interpretation than that mentioned above.) The Officers' Club in the instant case is considered to fall under the category of ' non-appropriated fund organizations authorized and regulated by the United States military authorities ' as stipulated in Article XV, paragraph 1 (*a*) of the Administrative Agreement, but with respect to the workers employed by such organizations paragraph 4 of Article XV provides that ' the conditions of the employment and work, the conditions for the protection of workers, and the rights of workers concerning labor relations ', generally, ' shall be those laid down by the legislation of Japan.' Agreement by one State to submit to the jurisdiction of another State for imposition of a fine should, even where it is agreed by a treaty, be recognized only when such willingness is clearly manifested. The provision of paragraph 4 of Article XV should not be interpreted to mean that the Japanese courts can impose a fine on an agency of the Government of the United States for violation of the labor laws and regulations.

" Besides, in view of the absence of any evidence in the instant case that the United States has agreed to submit to the jurisdiction of the Japanese courts, this Court is not entitled to exercise jurisdiction to impose a fine on the United States or the Officers' Club in this case."

[Report: *Japanese Annual of International Law*, No. 2 (1958), p. 140.]

Jurisdiction—Exemptions from—Foreign Armed Forces—United States Military Base in Italy—Whether Department of United States Army Exempt from Jurisdiction of Italian Courts in Respect of Contracts of Employment at Military Base—The Law of Italy.

See p. 201 (*Department of the United States Army* v. *Savellini*).

(e) MISCELLANEOUS

Jurisdiction—Exemptions from—International Organizations—The United Nations.

See p. 509 (*Wencak* v. *United Nations*).

Jurisdiction—Exemptions from—International Organizations—International Refugee Organization.

See p. 510 (*Maida* v. *Administration for International Assistance*).

Jurisdiction—Exemptions from—Agency of Occupant in Occupied Territory—Occupation of Germany—Joint Export-Import Agency—Counterclaim against Successor of Joint Export-Import Agency—Whether German Courts Competent to Determine Counterclaim.

See p. 783 (*Joint Export-Import Agency* (*Germany*) *Case*).

Jurisdiction—Exemptions from—Consuls—Acts in Performance of Official Functions—What Constitutes Such Acts—The Law of France.

See p. 445 (*Boyer and Another* v. *Aldrete*).

II.—Personal

i.—Over Nationals in Respect of Crimes Committed Abroad

Jurisdiction—Over Citizens Abroad—Conditions of Exercise—The Law of India—Indian Ambassador Acting as Political Agent.

THE STATE *v.* MOTAB DEWAN AND ANOTHER.

India, High Court of Patna. May 12, 1955.

(Imam J.)

THE FACTS.—The defendants, both nationals of India, in 1953 committed dacoity (acts of banditry) in the State of Nepal. They were arrested and, after their case had been investigated by a court in Nepal, they were extradited to India, where they were committed for trial. A preliminary objection was raised on the ground that the Indian Court had no jurisdiction because the offence was committed abroad and because the certificate required by Section 188 of the Code of Criminal Procedure, to the effect that the charge ought to be enquired into in India, had been issued not by the Political Agent, as required by Section 188, but by the Indian Ambassador in Nepal who (it was contended) was not the Political Agent within the meaning of Section 188.

Held: that the objection must fail. The offence could be tried in an Indian court in spite of the fact that it had been committed abroad; the defendants were nationals of India and under Section 188 of the Code of Criminal Procedure any offence committed by an Indian national abroad could be tried in an Indian court. The Indian Ambassador in Nepal was a Political Agent within the meaning of Section 188 of the Code of Criminal Procedure.

The Court quoted Section 188, which reads as follows:

> " S. 188. When an offence is committed by—
>
> " (a) any citizen of India in any place without and beyond India; or
>
> " (b) any person on any ship or aircraft registered in India, wherever it may be,
>
> " he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:
>
> " Provided that notwithstanding anything in any of the preceding Sections of this Chapter no charge as to any such offence shall be inquired into in India unless the Political Agent, if there is one for the territory in which the offence is alleged to have been committed, certifies that in his opinion the charge ought to be inquired into in India; and where there is no Political Agent, the sanction of the State Government shall be required."

The Court had no doubt as to the fact that the offence had been committed by an Indian national abroad. As to the validity of the certificate under Section 188, it enquired whether the certificate given by the Ambassador Extraordinary and Plenipotentiary in Nepal could be deemed to be a certificate given by the Political Agent and gave an affirmative answer to that question.

[Report: A.I.R. 1956 Patna 46.]

ii.—Over Nationals Abroad or on the High Seas and their Property Abroad.

Jurisdiction — Personal — Protection of Industrial Property — Trade-Marks—Infringement Committed in Foreign Country by National of State Asserting Jurisdiction—Effect within State Asserting Jurisdiction—The Law of the United States of America.

STEELE *ET AL. v.* BULOVA WATCH CO., INC.

United States, Court of Appeals, Fifth Circuit. February 21, 1952.

Supreme Court. December 22, 1952.

(Vinson C.J.; Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton JJ.)

THE FACTS.—This was an action for injunctive and monetary relief under the Lanham Trade-Mark Act of 1946 (60 Stat. 427, 15 U.S.C. § 1051 *et seq.*) against infringement of trade-mark and unfair competition by the defendant, a citizen and resident of the United States. The case arose on motion to dismiss; for these purposes the factual assertions of the plaintiff were taken as true.

Bulova Watch Co. manufactured, advertised, and distributed watches in the United States and foreign countries under the trade-mark " Bulova ", which had been registered in the United States. Steele had transferred his watch business, first established in the United States, to Mexico and in 1933 secured the registration in that country of the trade-mark " Bulova ". There he assembled Swiss watch movements and dials and cases imported from that country and the United States, stamped them with the name " Bulova ", and sold them as such. As the result of the distribution of spurious " Bulovas ", Bulova Watch Company's Texas sales representative received numerous complaints from retail jewellers in the Mexican border area whose customers brought in for repair defective " Bulovas " which upon inspection often turned out not to be products of that company.

The defendant was personally served with process in the United States. He challenged the jurisdiction of the District Court over the subject matter of the suit and interposed several defences including his due registration in Mexico of the mark " Bulova " and the pendency of Mexican legal proceedings thereon. The District Court dismissed the complaint on the ground that the Court lacked jurisdiction of the case by reason of the fact that the defendant had committed no illegal acts within the United States.

On appeal,

Held (by the Court of Appeals): that the decision of the Court below must be reversed. The Lanham Trade-Mark Act was intended to extend to the foreign as well as domestic commerce of the United States. The exercise of jurisdiction by the United States over the activities of one of its nationals in Mexico would involve no conflict with the sovereignty of Mexico. [Report: 194 F. 2d 567.]

The Supreme Court granted *certiorari*. While the case was pending in the Supreme Court, the Supreme Court of Mexico rendered a judgment upholding an administrative ruling which had nullified Steele's Mexican registration of " Bulova ".

Held (by the Supreme Court, *per* Clark J.): that the decision of the Court of Appeals must be affirmed. The conduct of the defendant fell within the Lanham Act as being foreign commerce carried on by a citizen of the United States, especially since the effects of his unlawful acts were felt within the United States. The United States was not debarred by any rule of international law from regulating the conduct of its citizens abroad. A national of a State could be required to desist from conduct in a foreign country in the absence of any possibility of conflict with the law of that country.

The Court said: " Petitioner concedes, as he must, that Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States. *Cf. Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 284–285 (1949); *Blackmer* v. *United States*, 284 U. S. 241, 436–437 (1932);[1] *Branch* v. *Federal Trade Commission*, 141 F. 2d 31 (1944). Resolution of the jurisdictional issue in this case therefore depends on construction of exercised congressional power, not the limitations upon that power itself. And since we do not pass on the merits of Bulova's claim, we need not now explore every facet of this complex and controversial Act. . . .

" On the facts in the record we agree with the Court of Appeals that petitioner's activities, when viewed as a whole, fall within the jurisdictional scope of the Lanham Act. This Court has often stated that the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears. *E. g., Blackmer* v. *United States*, 284 U. S. 421, 437 (1932);[1]

[[1] See *Annual Digest*, 1931–1932, Case No. 92.]

Foley Bros., Inc. v. *Filardo*, 336 U.S. 281, 285 (1949). The question thus is 'whether Congress intended to make the law applicable' to the facts of this case. *Ibid.* For 'the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government.' *Skiriotes* v. *Florida*, 313 U.S. 69, 73 (1941).[1] [2] As Mr. Justice Minton, then sitting on the Court of Appeals, applied the principle in a case involving unfair methods of competition:

> 'Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States.' *Branch* v. *Federal Trade Commission*, 141 F. 2d 31, 35 (1944)[3].

Nor has this Court in tracing the commerce scope of statutes differentiated between enforcement of legislative policy by the Government itself or by private litigants proceeding under a statutory right. *Thomsen* v. *Cayser*, 243 U. S. 66 (1917); *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948); *cf. Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377 (1948),[4] *Foley Bros., Inc.* v. *Filardo, supra.* The public policy subserved is the same in each case. In the light of the broad jurisdictional grant in the Lanham Act, we deem its scope to encompass petitioner's activities here. His operations and their effects were not confined within the territorial limits of a foreign nation. He bought component parts of his wares in the United States, and spurious 'Bulovas' filtered through the Mexican border into this country; his competing goods could well reflect adversely on Bulova Watch Company's trade reputation in markets cultivated by advertising here as well as abroad. Under similar factual circumstances, courts of the United States have awarded relief to registered trade-mark owners, even prior to the advent of the broadened commerce provisions of the Lanham Act.[5] *George W. Luft Co.* v. *Zande Cosmetic Co.*, 142 F. 2d 536 (1944); *Hecker H-O Co.* v. *Holland Food Corp.*, 36 F. 2d 767 (1929); *Vacuum Oil Co.* v. *Eagle Oil Co.*, 154 F. 867 (1907), aff'd, 162 F. 671 (1908). *Cf. Morris* v. *Altstedter*, 93 Misc. 329, 156 N. Y. S. 1103, aff'd. 173 App. Div. 932, 158 N. Y. S. 1123 (1916). Even when most jealously read, that Act's sweeping reach into ' all commerce which may lawfully be regulated by Congress ' does not constrict prior law or deprive courts of jurisdiction previously exercised. We do not deem material that petitioner affixed the mark ' Bulova ' in Mexico City rather than here,[1] or that his purchases in the United States when viewed in isolation do not violate any of our laws. They were essential steps in the course of business consummated abroad; acts in themselves legal lose that character when they become part of an unlawful scheme. *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 720 (1944); *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254 (1942). ' [I]n such a case it is not material that the source of the forbidden effects upon . . . commerce arises in one phase or another of that program.' *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 237 (1948). *Cf. United States* v. *Frankfort Distilleries*, 324 U. S. 293, 297–298 (1945). In sum, we do not think that petitioner by so simple a device can evade the thrust of the laws of the United States in a privileged sanctuary beyond our borders.

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[1] See, *e.g.*, 1 Oppenheim, International Law (6th ed., Lauterpacht, 1947), § 145, p. 297.

[[2] See *Annual Digest*, 1941–1942, Case No. 68.]

[[3] *Ibid.*, 1943–1945, Case No. 47.]

[[4] *Ibid.*, 1947, Case No. 18.]

[5] Cf. 15 U.S.C. §§ 96, 124, requiring the infringing use to be "in commerce among the several States, or with a foreign nation." *United States Printing & Lithograph Co.* v. *Griggs, Cooper & Co.*, 279 U.S. 156 (1929); *Pure Oil Co.* v. *Puritan Oil Co.*, 127 F. 2d 6 (1942).

" *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909), compels nothing to the contrary. This Court there upheld a Court of Appeal's affirmance of the trial court's dismissal of a private damage action predicated on alleged violations of the Sherman Act.[2] The complaint, in substance, charged United Fruit Company with monopolization of the banana import trade between Central America and the United States, and with the instigation of Costa Rican governmental authorities to seize plaintiff's plantation and produce in Panama. The Court of Appeals reasoned that plaintiff had shown no damage from the asserted monopoly and could not found liability on the seizure, a sovereign act of another nation.[3] This Court agreed that a violation of American laws could not be grounded on a foreign nation's sovereign acts. Viewed in its context, the holding in that case was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country, absent in the posture of the *Banana* case before us, are often decisive; this Court held as much in *Thomsen* v. *Cayser*, 243 U. S. 66 (1917), and *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927).[4][5] As in *Sisal*, the crux of the complaint here is ' not merely of something done by another government at the instigation of private parties; ' petitioner by his ' own deliberate acts, here and elsewhere . . . brought about forbidden results within the United States.' 274 U. S., at 276. And, unlike the *Banana* case, whatever rights Mexico once conferred on petitioner its courts now have decided to take away.

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[1] See *Vacuum Oil Co.* v. *Eagle Oil Co.*, 154 F. 867 (1907).

[2] 166 F. 261 (C. A. 2d Cir. 1908), affirming 160 F. 184.

[3] 166 F., at 264, 266.

[[4] See *Annual Digest*, 1927–1928, Case No. 117.]

[5] See also *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 443–444 (1945). *Cf. Ford* v. *United States*, 273 U.S. 593, 620–621 (1927); *Lamar* v. *United States*, 240 U.S. 60, 65–66 (1916); *Strassheim* v. *Daily*, 221 U.S. 280, 284–285 (1911).

" Nor do we doubt the District Court's jurisdiction to award appropriate injunctive relief if warranted by the facts after trial. 15 U. S. C. §§ 1116, 1121. Mexico's courts have nullified the Mexican registration of ' Bulova '; there is thus no conflict which might afford petitioner a pretext that such relief would impugn foreign law. The question, therefore, whether a valid foreign registration would affect either the power to enjoin or the propriety of its exercise is not before us. Where, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction. *New Jersey* v. *New York*, 283 U. S. 473 (1931); *Massie* v. *Watts*, 6 Cranch 148 (1810); *The Salton Sea Cases*, 172 F. 792 (1909); *cf. United States* v. *National Lead Co.*, 332 U. S. 319, 351–352, 363 (1947).[1]"

Reed J., with whom Douglas J. joined, dissented on the ground that the Lanham Act should be construed to apply only to acts done within the sovereignty of the United States. In his dissenting opinion, he said:

" The purpose of the Lanham Act is to prevent deceptive and misleading use of trade-marks. § 45, 15 U.S.C. § 1127. To further that purpose the Act makes liable in an action by the registered holder of the trade-mark ' any person who shall, in commerce,' infringe such trade-mark. § 32 (1), 15 U.S.C. § 1114. ' Commerce ' is defined as being ' all commerce which may lawfully be regulated by Congress.' § 45, 15 U.S.C. § 1127.

" The Court's opinion bases jurisdiction on the Lanham Act. In the instant case the only alleged acts of infringement occurred in Mexico. The acts complained of were the stamping of the name ' Bulova ' on watches and the subsequent sale of the watches. There were purchases of assembly material in this country by petitioners. Purchasers from petitioners in Mexico brought the assembled watches into the United States. Assuming that Congress has the power to control acts of our citizens throughout the world, the question presented is one of statutory construction: Whether Congress intended the Act to apply to the conduct here exposed.

" ' The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, *Blackmer* v. *United States*, [284 U. S. 421], 437,[2] is a valid approach whereby unexpressed congressional intent may be ascertained.' *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285. Utilizing this approach, does such a contrary intent appear in the Lanham Act? If it does, it appears only in broad and general terms, *i.e.*, ' to regulate commerce within the control of Congress . . .' § 45, 15 U.S.C. § 1127. Language of such nonexplicit scope was considered by the Court in construing the Sherman Act in *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357. ' Words having universal scope, such as " Every contract in restraint of trade,"

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[1] *Cf. Cole* v. *Cunningham*, 133 U. S. 107, 117–119 (1890); *Phelps* v. *McDonald*, 99 U. S. 298, 307–308 (1879); *Securities and Exchange Commission* v. *Minas de Artemisa, S. A.*, 150 F. 2d. 215 (1945); Restatement, Conflict of Laws, §§ 94, 96. And see *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, [1952] 2 All Eng. 780, 782 (C. A.) [*International Law Reports*, 1952, Case No. 36].

[[2] See *Annual Digest*, 1931–1932, Case No. 92.]

"Every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch.' The *American Banana Co.* case confined the Sherman Act in its 'operation and effect to the territorial limits over which the lawmaker has general and legitimate power.' 213 U.S., at 357. This was held to be true as to acts outside the United States, although the parties were all corporate citizens of the United States subject to process of the federal courts.

"The generally phrased congressional intent in the Lanham Act is to be compared with the language of the Fair Labor Standards Act which we construed in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377. There we held that by explicitly stating that the Act covered 'possessions' of the United States, Congress had intended that the Act was to be in effect in all 'possessions' and was not to be applied merely in those areas under the territorial jurisdiction or sovereignty of the United States.

"There are, of course, cases in which a statement of specific contrary intent will not be deemed so necessary. Where the case involves the construction of a criminal statute 'enacted because of the right of the Government to defend itself against obstruction, or fraud . . . committed by its own citizens,' it is not necessary for Congress to make specific provisions that the law 'shall include the high seas and foreign countries.' *United States* v. *Bowman*, 260 U.S. 94, 98.[1] This is also true when it is a question of the sovereign power of the United States to require the response of a nonresident citizen. *Blackmer* v. *United States*, 284 U.S. 421.[2] A similar situation is met where a statute is applied to acts committed by citizens in areas subject to the laws of no sovereign. See *Skiriotes* v. *Florida*, 313 U.S. 69;[3] *Old Dominion S. S. Co.* v. *Gilmore*, 207 U.S. 398.

"In the instant case none of these exceptional considerations come into play. Petitioners' buying of unfinished watches in the United States is not an illegal commercial act. Nor can it be said that petitioners were engaging in illegal acts in commerce when the finished watches bearing the Mexican trade-mark were purchased from them and brought into the United States by such purchasers, all without collusion between petitioner and the purchaser. The stamping of the Bulova trade-mark, done in Mexico, is not an act 'within the control of Congress.' It should not be utilized as a basis for action against petitioner. The Lanham Act, like the Sherman Act, should be construed to apply only to acts done within the sovereignty of the United States. While we do not condone the piratic use of trade-marks, neither do we believe that Congress intended to make such use actionable irrespective of the place it occurred. Such extensions of power bring our legislation into conflict with the laws and practices of other nations, fully capable of punishing infractions of their own laws, and should require specific words to reach acts done within the territorial limits of other sovereignties."

[Reports: 344 U. S. 280, 97 L.Ed. 319, 73 Sup. Ct. 252.]

NOTE.—The above case is noted in *George Washington Law Review*, 21 (1952), p. 115; *Georgetown Law Journal*, 41 (1953), p. 420; *Harvard Law Review*, 67 (1953), p. 143; *Journal of Public Law*, 2 (1953), p. 207; *New York University Law Review*, 27 (1952), p. 519; *North-western University Law Review*, 47 (1952), p. 677; *Notre Dame Lawyer*, 27 (1952), p. 638; [1953] *University of Illinois Law Forum*, p. 307; *University of Pennsylvania Law Review*, 100 (1952), p. 1241; and *Vanderbilt Law Review*, 6 (1953), p. 779.

[1] See *Annual Digest*, 1919–1922, Case No. 109.]

[2] *Ibid.*, 1931–1932, Case No. 92.]

[3] *Ibid.*, 1941–1942, Case No. 68.]

Jurisdiction—Personal—Over Nationals Abroad—Protection of Industrial Property—Infringement of Trade-Mark and Trade Name and Unfair Competition in Foreign State—Registration by Infringer of Trade-Mark in Foreign State—Effect of—Recognition of Act of Foreign State—The Law of the United States of America.

RAMIREZ & FERAUD CHILI CO. *v.* LAS PALMAS FOOD CO., INC., *ET AL.*

United States, District Court, Southern District, California.

November 8, 1956.

THE FACTS.—This was an action for an injunction to restrain alleged infringement and unfair competition in the use of plaintiff's trade-mark and trade name " Las Palmas ", for treble damages, and for other equitable relief under the Trade-Mark Act of 1946 (the Lanham Act) (60 Stat. 427, 15 U. S. C. §§ 1051–1127, 28 U. S. C. § 1338 (a)). The proceedings here reported were on plaintiff's motion for a preliminary injunction and the defendants motion to dismiss.

The facts alleged in the complaint and found to be true for the purposes of the motion to dismiss were as follows: The plaintiff was the owner of the United States trade-mark " Las Palmas ", which had been used for tinned Spanish foods and sauces in the United States since 1922 and in foreign commerce between the United States and Mexico since 1948. The plaintiff had developed valuable good will associated with the trade-mark and trade name in the United States and in Mexico, especially in the border towns.

The defendant corporation had been incorporated in California in 1953. At that time the defendant Worthington, a United States citizen, and the defendant Gavaldon, a citizen of Mexico and a resident of California, chose the name ' Las Palmas " with knowledge of the prior use of this trade-mark by the plaintiff. The defendants registered that trade-mark in Mexico in the same year. In 1955, the defendants caused to be printed in California what was in effect a deliberate counterfeit of the plaintiff's label. They then transported these labels to Mexico, affixed them to tins of a red chili sauce, and sold this product in Mexico, particularly in the border towns in which the plaintiff's sauce was popular. Persons of Mexican descent residing in the border towns on the American side of the international boundary often purchased their groceries in Mexico and transported them back to the United States. These individuals were amongst those alleged to be deceived by the defendants' product, which was inferior in quality to the plaintiff's. In 1955, the defendants had also circulated letters to the plaintiff's brokers and wholesalers in which it was falsely stated that the exportation of the plaintiff's products in Mexico would be an infringement of the defendants' trade-mark in that country. Purchases of the plaintiff's products had thereby been drastically reduced. The plaintiff had filed a petition in Mexico to cancel the defendants' trade-mark, but such proceedings normally required a year to complete.

Held: that the preliminary injunction must issue, enjoining the defendants from employing the trade-mark "Las Palmas" in the United States or Mexico, from selling any Spanish-type foods bearing that trade-mark, from representing that the use of the trade-mark by any plaintiff infringed any right of the defendants, from hampering the plaintiff's gathering of evidence in Mexico, and from transferring any rights they might have in the Mexican trade-mark. A State has the power to regulate the conduct of its nationals abroad and to impose liability upon persons not its nationals for acts done abroad which cause damage within the territorial limits of that State. While legislation is *prima facie* territorial, the Congress had minifested an intention that the Lanham Act should extend to the foreign commerce of the United States. A State has jurisdiction over unfair trade practices which originate outside the territory of that nation but have their consequences within that territory. Since the foreign registration of a trade-mark merely creates a licence, to forbid the use of that trade-mark does not involve a determination of the invalidity of the registration offensive to the sovereignty of the foreign State.

The Court said: "Comprehensive statutory remedies are provided in the Lanham Act 'for infringement of marks'. See 15 U.S.C.A. § 1126 (h); *S. C. Johnson & Son* v. *Johnson*, 2 Cir., 175 F.2d 176, *certiorari* denied, 1949, 338 U.S. 860, 70 S.Ct. 103, 94 L.Ed. 527. These statutory remedies include broad injunctive relief, as well as damages, for infringement and for unfair competition in the use of any registered mark. 15 U.S.C.A. §§ 1114, 1116–1119. These federal remedies are, by the terms of the statute [*ibid.*], limited to marks that are registered under the Act; and 'mark' is defined as including, unless the contrary is plainly apparent from the context, 'any trade-mark, service mark, collective mark, or certification mark entitled to registration . . ..' Id. § 1127.

"The Act also gives to 'citizens or residents of the United States', id. § 1126 (i), owning 'trade names or commercial names', id. §§ 1126 (g), 1127, 'whether or not they form parts of marks', id. §. 1126 (g), and whether such names be anywhere registered or unregistered, id. § 1126 (a, g), a federal cause of action for unfair competition in the use of such names, with the same remedies as provided in the Act for infringement of registered marks, *cf. Hodgson* v. *Fifth Ave. Plastics*, D.C.S.D.N.Y. 1950, 94 F.Supp. 160, 'available so far as they may be appropriate in repressing acts of unfair competition' in the use of such names. 15 U.S.C.A. § 1126 (h).

"Accordingly it is held that the Lanham Act creates a federal cause of action for infringement of marks registered under the Act, *S. C. Johnson & Son* v. *Johnson, supra,* 175 F.2d at page 178, and for unfair competition in the use of registered marks and trade and commercial names as well. *Pagliero* v. *Wallace China Co.*, 9 Cir., 1952, 198 F.2d. 339; *In re Lyndale Farm,* 1951, 186 F.2d 723, 38 C.C.P.A., Patents, 825; *Stauffer* v. *Exley*, 9 Cir., 1950, 184 F.2d 862; *Old Reading Brewery* v. *Lebanon Valley Brewing Co.*, D.C.M.D.Pa. 1952, 102 F. Supp. 434, 437–438; see *Time, Inc.* v. *T. I. M. E. Inc.*, D.S.C.D.Cal. 1954, 123 F.Supp. 446.

" Defendants contend, however, that their conduct of which plaintiff complains is not within the reach of the Lanham Act.

" In the exercise of authority constitutionally delegated, the Congress wields the power of the nation as sovereign. Inherent in national sovereignty is the power to regulate the conduct of citizens or nationals abroad; a power which rests upon the allegiance owed to this country by every citizen and national. *Blackmer* v. *United States*, 1932, 284 U.S. 421, 436–437, 52 S.Ct. 252, 76 L.Ed. 375;[1] *Cook* v. *Tait*, 1924, 265 U.S. 47, 44 S.Ct. 444, 68 L.Ed. 895;[2] *United States* v. *Bowman*, 1922, 260 U.S. 94, 43 S.Ct. 39, 67 L.Ed. 149;[3] *cf. Johnson* v. *Eisentrager*, 1950, 339 U.S. 763, 769, 70 S.Ct. 936, 94 L.Ed. 1255.[4]

" Also inherent in national sovereignty is the power to impose, even upon foreigners owing no allegiance, liability for acts done abroad which proximately cause damage within the territorial limits of the sovereign. *United States* v. *Sisal Sales Corp.*, 1927, 274 U.S. 268, 276, 47 S.Ct. 592, 71 L.Ed. 1042;[5] *Thomsen* v. *Cayser*, 1917, 243 U.S. 66, 88, 37 S.Ct. 353, 61 L.Ed. 597; *United States* v. *Aluminum Co. of America*, 2 Cir., 1945, 148 F.2d 416.

" So the problem at bar, as in *Steele* v. *Bulova Watch Co.*, 1952, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 252 [reported *supra*, p. 270], is not one of finding requisite Congressional power to confer jurisdiction, but one of finding requisite Congressional intent. As Mr. Chief Justice Hughes put it in *Blackmer* v. *United States, supra*: ' While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.' 284 U.S. at page 437, 52 S.Ct. at page 254.

" Inasmuch as ' the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done ', all legislation is properly deemed ' *prima facie* territorial '. *American Banana Co.* v. *United Fruit Co.*, 1909, 213 U.S. 347, 356–357, 29 S.Ct. 511, 512, 53

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[1] *Annual Digest*, 1931–1932, Case No. 92.]

[2] *Ibid.*, 1923–1924, Case No. 80.]

[3] *Ibid.*, 1919–1922, Case No. 109.]

[4] *Ibid.*, 1949, Case No. 153.]

[5] *Ibid.*, 1927–1928, Case No. 117.]

L.Ed. 826; and see *Foley Bros.* v. *Filardo*, 1949, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680; *cf. Cuba R. R. Co.* v. *Crosby*, 1912, 222 U.S. 473, 479, 32 S.Ct. 132, 56 L.Ed. 274; *Slater* v. *Mexican National R. R. Co.*, 1904, 194 U.S. 120, 126, 24 S.Ct. 581, 48 L.Ed. 900.

" It was the Congressional will to occupy the field with respect to claims arising from infringement of and unfair competition in the use of registered trade-marks and other marks defined in the Act, as well as trade names and commercial names, 15 U.S.C.A. §§ 1126 (g, i), 1127, to the extent of Federal power under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as plainly appears from the statutory declaration that:

" ' The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; . . . to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations.' 15 U.S.C.A. § 1127; see Senate Rep. No. 1333, U.S. Code Cong. Serv. 79th Cong., 2d Sess. pp. 1274–1278 (1946); *cf. United States Printing & Lithograph Co.* v. *Griggs, Cooper & Co.*, 1929,279 U.S. 156, 158, 49 S.Ct. 267, 73 L.Ed. 650; *Dad's Root Beer Co.* v. *Doc's Beverages*, 2 Cir., 1951, 193 F.2d 77, 81–82.

" The Congressional intent was thus expressed to extend the Lanham Act to the limits of authority constitutionally delegated—to all ' commerce within the control of Congress '. 15 U.S.C.A. § 1127. ' Commerce within the control of Congress ' expressly includes all ' Commerce with foreign Nations, and among the several States ', U.S. Const. art. I, § 8, cl. 3, and may be said to exclude only such conduct as does not substantially affect interstate or foreign commerce. *United States Printing & Lithograph Co.* v. *Griggs, Cooper & Co., supra*, 279 U.S. at page 158, 49 S.Ct. 267; *Warner* v. *Searle & Hereth Co.*, 1903, 191 U.S. 195, 206, 24 S.Ct. 79, 48 L.Ed. 145; *In re Trade-Mark Cases*, 1879, 100 U.S. 82, 96, 25 L.Ed. 550.

" The Congress having elected to exercise the sovereign power of the nation in this field to the extent of authority delegated under the Constitution, and having chosen to effectuate this intent through jurisdiction conferred upon the federal courts, 15 U.S.C.A. § 1121, jurisdiction in the sense of power is here present. *Steele* v. *Bulova Watch Co.*, . . . 344 U.S. at page 287, 73 S.Ct. 252; *cf. The Fair* v. *Kohler Die & Specialty Co.*, 1913, 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716; *Fauntleroy* v. *Lum*, 1908, 210 U.S. 230, 234–235, 28 S.Ct. 641, 52 L.Ed. 1039; *The Resolute*, 1897, 168 U.S. 437, 439, 18 S.Ct. 112, 42 L.Ed. 533.

" In *Steele* v. *Bulova Watch Co.*, . . . as Mr. Justice Clark points out, unfair trade practices were committed by an American citizen in Mexico; ' trade practices which radiate unlawful consequences here '. 344 U.S. at page 288, 73 S.Ct. at page 256. So in the case at bar.

" The Court found federal jurisdiction of the subject matter in *Steele*, even though the acts done in the United States ' when viewed in isolation do not violate any of our laws.' 344 U.S. at page 287, 73 S.Ct. at page 256. By contrast, the acts of defendants at bar, in causing to be introduced into ' commerce ' within the United States counterfeits of plaintiff's registered mark on labels, procured by defendants to be printed within the United States and ' intended to be used upon . . . goods ', are acts which do violate our laws. 15 U.S.C.A. § 1114 (1).

" Section 1114 of Title 15 provides in part that ' Any person who shall, in commerce . . . (b) reproduce, counterfeit, copy, or colorably imitate any . . . [registered] mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, . . . packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of . . . goods . . . shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided . . . except that . . . the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such mark is intended to be used to cause confusion or mistake or to deceive purchasers.' 15 U.S.C.A. § 1114 (1) (b).

" Thus the case at bar has a jurisdictional base equal to *Steele* and more; for here there are not only unfair trade practices committed by an American citizen in Mexico ' which radiate unlawful consequences here,' but also acts committed in the United States which clearly violate the Lanham Act.

" Defendants urge, nevertheless, that even though this court may have the power to grant the relief plaintiff prays, the court should abstain from exercising that power because to do so would offend the sovereignty of the Republic of Mexico. This is so, defendants contend, because the registration by defendants in Mexico of their counterfeited copy of plaintiff's trade-marks is presumably valid under Mexican law until cancelled.

" This argument raises questions of policy or comity; considerations that rule whether jurisdictional power, conceded to exist, should be exercised in a given case. This problem was not before the Supreme Court in *Steele*, since by the time the case was reached Mexico had nullified Steele's spurious Mexican registration of the long-standing Bulova mark.

" But the problem was before the Court of Appeals, for the Fifth Circuit when the *Steele* case was decided there, and Judge Rives' well reasoned opinion could well serve as a complete answer to the questions raised here. *Bulova Watch Co.* v. *Steele*, 5 Cir., 1952, 194 F.2d 567.

" Although plaintiff at bar has filed proceedings in Mexico to cancel or nullify the registration by defendants of plaintiff's mark there, it is conceded that one year or more must pass before plaintiff can expect a final determination of this application.

" Meantime, as defendants point out, this court must assume the registration of plaintiff's mark by defendants in Mexico to be valid there. So to assume does not necessarily mean however that exercise of this court's jurisdiction to grant the relief plaintiff seeks ' would impugn foreign law ' or be an ' interference with the sovereignty of another nation '. 344 U.S. at page 289, 73 S.Ct. at page 257.

" For at the most defendants' Mexican registration of plaintiff's mark can have no greater effect than to confer upon defendants a license or permission to use the mark in Mexico. It is not even contended that any public policy of Mexico requires defendants ever to exercise that license.

" So there could be no affront to Mexican sovereignty or Mexican law if, as between the parties, this court should declare that defendants may not so use their license under Mexican law as to injure plaintiff's foreign commerce conducted from the United States. *United States* v. *Sisal Sales Co.*, *supra*, 274 U.S. at page 276, 47 S.Ct. 592; Restatement, Conflict of Laws §§ 377, 80, 63.

" It should perhaps be emphasized that plaintiff does not seek a determination that any act of a foreign sovereign is invalid. *Cf. American Banana Co.* v. *United Fruit Co.*, *supra*, 213 U.S. at page 358, 29 S.Ct. 511; *Bernstein* v. *Van Heyghen*, 2 Cir., 163 F.2d 246, 249, *certiorari* denied, 1947, 332 U.S. 772, 68 S.Ct. 88, 92 L.Ed. 357;[1] *Banco de Espana* v. *Federal Reserve Bank*, 2 Cir., 1940, 114 F.2d 438, 443.[2] Nor does plaintiff ask this court to negate something that has already been determined in adversary proceedings between the parties at bar in a foreign forum. *Cf. Vanity Fair Mills* v. *T. Eaton Co.*, 2 Cir., 234 F.2d 633, 646–647, *certiorari* denied, 1956, 77 S.Ct. 96 [reported *supra*, p. 134, in this volume]; *Geo. W. Luft Co.* v. *Zande Cosmetic Co.*, 2 Cir., 142 F.2d 536, 540, *certiorari* denied, 1944, 323 U.S. 756, 65 S.Ct. 90, 89 L.Ed. 606. Thus comity does not here argue against exercise of the power which the Congress has conferred.

" Neither does policy dictate that this court should disavow or decline jurisdiction in favor of another forum. Indeed, the Senate Committee reporting upon the Lanham Act declared that ' when it is considered that the protection of trade-marks is merely protection to goodwill, to prevent diversion of trade through misrepresentation, and the protection of the public against deception, a sound public policy requires that trade-marks should receive nationally the

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[1 *Annual Digest*, 1947, Case No. 5.]

[2 *Ibid.*, 1940, Case No. 6.]

greatest protection that can be given them.' U.S. Code Cong. Serv. 79 Cong., 2d Sess. p. 1277 (1946).

" And to effectuate this ' sound public policy ', despite possible injury to the commerce of a foreign country, the Act even provides that: ' No article of imported merchandise which shall copy or simulate the name of . . . any domestic . . . manufacturer, or trader, . . . or which shall copy or simulate a trade-mark registered in accordance with the provisions of this chapter . . . shall be admitted to entry at any customhouse of the United States. . . .' 15 U.S.C.A. § 1124. [The Court here dealt with certain aspects of the municipal law of the United States with respect to unfair competition.]

" Equity jurisdiction as conferred by the Constitution on the federal courts imposes the duty to adjudicate in keeping with the equitable rules and principles recognized by the Court of Chancery in England at the time our Constitution was formed. *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 1939, 306 U.S. 563, 568, 59 S.Ct. 657, 83 L.Ed. 987.

" Always to be heeded is the admonition of *Giles* v. *Harris*, 1903, 189 U.S. 475, 23 S.Ct. 639, 47 L.Ed. 909 that: ' In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make.' 189 U.S. at page 487, 23 S.Ct. at page 642.

" To borrow the words of Mr. Justice Clark in *Steele* v. *Bulova Watch Co., supra*, 344 U.S. at page 289, 73 S.Ct. at page 257 [reported *supra*, p. 270, in this volume]: ' Where, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction.' *State of New Jersey* v. *New York*, 1931, 283 U.S. 473, 474, 51 S.Ct. 519, 75 L.Ed. 1176; *Massie* v. *Watts*, 1810, 6 Cranch. 148, 3 L.Ed. 181; *The Salton Sea Cases*, 9 Cir., 1909, 172 F.792; *cf. United States* v. *National Lead Co.*, 1947, 332 U.S. 319, 351–352, 363, 67 S.Ct. 1634, 91 L.Ed. 2077.

" As explained in *Phelps* v. *McDonald*, 1878, 99 U.S. 298, 25 L.Ed. 473: ' Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily, to give full effect to the decree against him . . . . Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*.' 99 U.S. at page 308."

" Accordingly plaintiff's motion for a preliminary injunction will be granted to the extent that, upon the filing by plaintiff with the Clerk of a bond or undertaking in the penal sum of $10,000, with good and sufficient surety approved as provided by local rule 8, and conditioned as required by Rule 65 of the Federal Rules of Civil Procedure, a writ of injunction shall issue, in the form and scope provided by Rule 65, enjoining and restraining the defendants and all persons referred to in Rule 65 (c), pending the hearing and determination of this action or until further order of court, as follows:

" (1) From using or employing, directly or indirectly in any way or manner, the trade-mark ' Las Palmas ', or any colorable imitation thereof, on or in connection with any sale, distribution, promotion, advertising for sale, or display, in either the United States or the Republic of Mexico, of any red chili sauce, or of any other Spanish-type foods or condiments which are like or closely related to any now manufactured or offered for sale by plaintiff;

" (2) From aiding or participating, directly or indirectly in any way or manner, in any sale, distribution, promotion, advertising for sale, or display, in either the United States or the Republic of Mexico, of any red chili sauce, or of any other Spanish-type foods or condiments like or closely related to any now manufactured or offered for sale by plaintiff, labeled with the trade-mark ' Las Palmas ', or any colorable imitation thereof, or with any other mark or label confusingly similar to plaintiff's label;

" (3) From representing, either orally or in writing, to any other person not a party to this suit, that the exportation to the Republic of Mexico, or the sale or distribution therein, of ' Las Palmas ' brand products manufactured or sold by plaintiff constitutes an infringement or other violation of any rights of defendants, or any of them; and

" (4) From impeding or interfering with, directly or indirectly in any way or manner, plaintiff's endeavours to gather evidence or testimony from plaintiff's wholesalers or distributors in the Republic of Mexico and, in particular, from urging or inducing, or in any way or manner attempting to induce, any of plaintiff's wholesalers or distributors to refuse to supply affidavits or testimony respecting plaintiff's use of the ' Las Palmas ' trade-mark in the Republic of Mexico.

" In order further to preserve pendente lite the *status quo ante*, defendants will be further restrained, pending the hearing and determination of this cause or until further order of court, from in any way or manner transferring or encumbering any right, title or interest in the Mexican trade-mark registration in question or any good will associated therewith in the Republic of Mexico, or the assets of that portion of the business of defendants, or any of them, in which is employed the trade-mark ' Las Palmas ' of Mexican registration, including specifically unused labels, signs, prints, packages, wrappers, receptacles, and advertisements, bearing the trade-mark ' Las Palmas ' thereon. Cf. *United States* v. *United Mine Workers*, 1947, 330 U.S. 258, 289-294, 67 S.Ct. 677, 91 L.Ed. 884; *United*

States v. *Shipp*, 1906, 203 U.S. 563, 573, 27 S.Ct. 165, 51 L.Ed. 319."

The Court concluded that the Lanham Act and the law of the State of California proscribed the acts of unfair competition of which the plaintiff complained.

[Reports: 146 F.Supp. 594; affirmed *per curiam*, 245 F.2d 874 (9th Cir. 1957); *certiorari* denied, 355 U.S. 927, 2 L.Ed. 2d 357, 78 Sup. Ct. 384 (1958).]

iii.—Miscellaneous

Jurisdiction—Miscellaneous—Jurisdiction over Former Prisoners of War—Offence Committed by Prisoner of War in Captivity—Offence against Military Law of Prisoner's Home Country—Whether Courts of Home Country Competent to Exercise Jurisdiction after Prisoner's Release from Captivity—The Law of Italy.

See p. 764 (*Re Tassoli*).

C—HIGH SEAS

II.—Jurisdiction on the High Seas

vi.—Enforcement of Hovering, Revenue and Other Municipal Laws

Jurisdiction—On the High Seas—Criminal Jurisdiction—Over Nationals with regard to Crimes Committed on National Vessel on High Seas—Territoriality of Ships—The Law of Israel—Admiralty Offences (Colonial) Act, 1849—Palestine Order in Council, 1922—Foreign Jurisdiction Act, 1890—International Law and Municipal Law.

STAMPFER *v.* ATTORNEY-GENERAL.

Israel, Supreme Court (*sitting as the Court of Criminal Appeals*).

(Cheshin, Deputy President; Goitein and Vitkon JJ.)

January 4, 1956.

THE FACTS (as stated by the Court).—" The appellant was prosecuted in the District Court of Haifa and convicted on several counts of manslaughter under s. 212 of the Palestine Criminal Code Ordinance, 1936. The act on which the charge was based occurred on the s.s. *Massada*, which sank on the high seas, or in one of her boats immediately before the sinking, when the appellant, an Israel national, was one of her crew. It is not in dispute that the vessel, after acquisition by its owners, an Israeli corporation, had been provisionally registered at the Israel Consulate in Copenhagen and was flying the Israel flag. The question of public international law which thus arose was whether the Israel courts have criminal jurisdiction over offences committed by Israel nationals in Israel ships on the high seas."

Held: that this question must be answered in the affirmative. The judgment of the Court was given by Cheshin, Deputy President (Vitkon J. concurring). He said: " The first question to be dealt with is whether the District Court of Haifa was competent to try and determine the case. It has been contended before us that s. 6 of the Criminal Code Ordinance, 1936, limits the territorial competence of the criminal courts to the territory of the State and a strip three nautical miles[1] wide along its coastline, and that the District Court of Haifa, therefore, was not competent to try the appellant for the offence in question, which, by common consent, was committed on the high seas. The said section 6, as modified by virtue of section 15 (a) of the Law and Administration Ordinance (No. 1 of 5708–1948), provides:

> ' The jurisdiction of the courts of Israel for the purposes of this Code extends to every place within Israel or within three nautical miles of the coast thereof measured from low water mark.'

This section undoubtedly introduced into the law of this country the principle of the territorial jurisdiction of the courts, which obtains in Great Britain and the United States of America. However, section 6 does not stand alone, but should in my opinion be read together with section 3 (b) of the Ordinance, which somewhat limits its application and by this very fact extends the area of jurisdiction of the courts. That section provides:

> ' . . . the provisions of this Code shall be without prejudice to (a) the liability of any person to be tried and punished for any offence against any law other than this Code; or (b) the liability of any person to be tried and punished for an offence under the provisions of any law relating to the jurisdiction of the Israel courts in respect of acts done beyond the ordinary jurisdiction of these courts '.

[After a reference to *Lahis* v. *Minister of Defence*[2] the Judge continued:] " The phrase ' for an offence against any law ' in section 3 (b) of the Ordinance does not refer to an act defined as an offence in any law other than the Criminal Code Ordinance, for such an offence is dealt with in section 3 (a). It refers to any other law empowering the courts—notwithstanding the provision of section 6 —to try a person who has committed an offence, including an offence under the Criminal Code Ordinance. We must examine, therefore, whether there is any other law empowering the courts in Israel to try a person who has committed an offence on the high seas, outside the territorial sea of the State.

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[1] [In 1956, after this judgment was given, the territorial sea of Israel was extended to six nautical miles.]

[2] [See *Annual Digest*, 1949, Case No. 34.]

"It is an important rule of public international law that merchant vessels on the high seas are under the jurisdiction of the State whose flag they lawfully fly and that the law of the flag State prescribes the rights and obligations of every person on board. The essential purpose of this rule is to protect the public from the law of the jungle (or here perhaps more exactly, the law of the sea). It is imperative for law and order to be established on ships sailing the high seas, lest they become places of lawlessness, where everybody does as he pleases and brute force prevails. The establishment of law and order in the remote and undefined spaces of the sea may be effected in one of two ways: (1) the State concerned in the matter may assume jurisdiction over persons and property situated in such a place; (2) every State may exercise unlimited jurisdiction in such a place, regardless of the rights and claims of other States. The first of these two ways has been adopted in international law, and the accepted principle is that persons under the protection of the flag of a particular State, when in places not under the sovereignty of any other State, are amenable to the laws and jurisdiction of that State as if they were within its territory. Therefore, by general consent, a merchant vessel on the high seas is deemed to be the State, or part of the State, whose flag she flies."

The Judge here quoted from the English case of *Forbes* v. *Cochrane*, (1824) 107 E.R. 450, emphasizing that that case did not concern British subjects but foreigners who had found refuge on a British ship, the Court ruling that they were under British jurisdiction; and *Reg.* v. *Anderson*, (1868) L.R. 1 C.C.R. 161. He also quoted from the judgment of the Permanent Court of International Justice in *The Lotus*[1] and from the United States cases *United States* v. *Flores*, 53 S.Ct. Rep. 580,[2] and *United States* v. *Rodgers*, 14 S.Ct. Rep. 109, and others. The Judge continued: "The position is the same with regard to the law of non-Anglo-Saxon countries. In an Italian case [quoted in Briggs, *The Law of Nations*, 2nd ed., p. 340[3]], it appeared that a member of the crew of an Italian vessel had misbehaved while the vessel was in a Spanish port. When the vessel returned to an Italian port the man was arrested, prosecuted and convicted of an offence against Italian law. The Italian Court of Cassation said in this connection:

> 'In regard to crimes committed on vessels which are in the territorial waters of a foreign State, writers and jurisprudence have for a long time accepted the distinction between . . . acts committed on board ship by members of the crew, the effect of which is confined to the ship, and acts which disturb the public order or involve the private rights of the foreign

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[[1] See *Annual Digest*, 1927–1928, Case No. 98.]

[[2] *Ibid.*, 1931–1932, Case No. 91.]

[[3] The reference is to *Public Prosecutor* v. *Tarasco*: *Annual Digest*, 1929–1930, Case No. 67.]

State. . . . In regard to the former category . . . the competence of the national courts remains intact, since the authority of the State follows merchant vessels according to the principle that the flag governs the ship in the relations of members of the crew.'

" In *Radov* v. *The Prince Pavel* (45 Federal Supplement 15, 16), an American Federal Court said:

' There can be no doubt that the law which governs the liability of the defendant is the law of Yugoslavia, the accident happening under its flag, upon a vessel and to a citizen of that country. A merchant ship on the high seas is of the country whose flag she flies, and the law of the flag applies to the right of action which arose on those seas. Jurisdiction and the laws of the national accompany the ship not only over the high seas but everywhere else she may be water-borne. . . .'

" In short: this jurisdiction, in both criminal and civil matters, is claimed by all countries which send their fleets—merchantmen and warships—to the high seas. The principle is a universal one, and as far as I have been able to ascertain it is not in dispute. The debate among lawyers is merely concerned with its source and *raison d'être*. Some explain its development by the ' floating island ' theory, according to which every ship on the high seas is deemed to be a floating part of the flag State (Oppenheim's *International Law*, 7th ed. (1948), vol. 1, p. 548). Others connect it with the ownership of the State and its right of control over its property and assets when these are in a place where no other State claims local jurisdiction (Hall, *International Law*, 5th ed. (1904), p. 253). Mention has been made in these proceedings of the English case of *R.* v. *Gordon-Finlayson*, [1941] 1 K.B. 171,[1] and it has been suggested that that decision marks a new departure in the question under discussion. But in my opinion that case has brought no revolution, great or small, into the concepts current in the legal field concerned. The Judges who sat in that case dissociated themselves from the ' floating island ' theory, *i.e.*, the notion that a ship on the high seas is a limb torn from the parent territory and floating on the high seas whilst retaining the properties of the living body which has stayed in its place; but it never occurred to them to deny the age-old principle that the jurisdiction of the courts of a particular State extends over merchant ships at sea flying the flag of that State. On the contrary, they repeatedly emphasized that the said rule prevailed in English law unchallenged. [The Judge here quoted passages from the judgments of Justice Humphreys, Justice Tucker and Justice Oliver in that case, and went on:] They repudiated, for the purpose of the question before them, the ' floating island ' theory, but in no way disputed the close connection between the flag of the ship and the law of the flag State, as regards the powers of the courts of that State.

" It may not be superfluous to quote here a short passage

[[1] See *Annual Digest*, 1941–1942, Case No. 67.]

representing one of the latest utterances on the subject. Hans Kelsen, in *Principles of International Law* (1952), discusses the rule of international law that on the high seas, outside the territorial waters of any State, every State may exercise jurisdiction over ships lawfully flying its flag. Here is what he says (at p. 223):

> ' The usual way to describe the legal situation of a vessel on the open sea is to say that it has to be considered as a floating part of its home state. That means that a vessel on the open sea is under the exclusive jurisdiction of the state under the flag of which it legitimately sails. Exclusive jurisdiction means that no other state but the flag state is entitled to exercise coercive power on board the ship which legitimately sails under its flag. That the ship is considered to be a floating part of its home state means further that the law of the flag state may provide that anything which happens on the ship shall be considered as if it happened on the territory of the flag state, such as the birth of a child, a commercial transaction, a crime, and the like.'

Summing up, Kelsen remarks even more pointedly (at p. 225):

> ' . . . each state is authorized by general international law . . . to exercise its own law and expecially to perform coercive acts on the open sea . . . on board its own ships . . . .'

" It is interesting to note that although the *Finlayson* case disapproves the ' floating island ' theory, Kelsen quotes Justice Humphreys' words in that case in support of his remarks on the principle of a State's jurisdiction over ships flying its flag and on the origin and *raison d'être* of that principle in international law (*ibid*, p. 223, n. 14). That principle has, in my opinion, become a part of the law of this country in three ways: first, by Article 46 of the [Palestine] Order-in-Council of 1922; second, by section 1 of the Admiralty Offences (Colonial) Act, 1849, which was incorporated in the laws of this country by Article 35 of the Order-in-Council of 1922; third, by virtue of the sovereignty of the State of Israel.

" We have already seen that this principle has its place in the English common law (see Justice Bovill's remarks in the above-cited *Anderson* case, pp. 166–167). It does not conflict with conditions in the State of Israel or the situation of its population, nor, as we have seen, does it conflict with any local law. For this reason, we may apply it by virtue of Article 46 of the Order-in-Council and the opening passage of section 11 of the Law and Administration Ordinance, 5708–1948.

" The second reference is section 1 of the Admiralty Offences (Colonial) Act, 1849, the provisions of which apply to Palestine [read: Israel] by virtue of Article 35 of the Order-in-Council of 1922. The said Act is described in its long title as follows: ' An Act to provide for the prosecution and Trial in Her Majesty's Colonies of Offences committed within the jurisdiction of the Admiralty.' These words, which, in my opinion, exhaustively state the contents of the Act, should be interpreted as follows: The Courts of the British

Colonies shall be competent to try any offence committed in a place within the range of the Admiralty's jurisdiction. This is made clear beyond doubt by the marginal note to section 1:

> 'All persons charged in any Colony with Offences committed on the Sea, may be dealt with in the same manner as if the Offences had been committed on waters within the local Jurisdiction of the Courts of the Colony.'

'Colony' in that Act apparently includes a country under British Mandate, notwithstanding the interpretation given to the term 'colony' in section 5 of the Act; for otherwise, what could have prompted the legislator, and what good could it have done, to extend that Act to Palestine, which was not at the time a British colony even by the wide interpretation given to that term in section 5 of the Act, but a Mandated territory. And what goes for Palestine goes for the State of Israel as well.

"But in addition to all the above, it seems to me that even if we are not able to rely on Article 46 of the Order-in-Council and section 1 of the English Act of 1849, we still have to decide that the said principle has become a part of the law of this country by virtue of Israel's being a sovereign independent State. The declaration of independence gave the new State access to the international laws and customs which all States enjoy by virtue of their sovereignty, and enriched its legal system by the accepted principles of the law of nations. We no longer need to obtain those principles second-hand, through specially provided secondary channels, for today we are able, by virtue of Israel's membership in the family of nations, to go to the fountain-head by virtue of the closing passage of section 11 of the Law and Administration Ordinance (which prescribes the law that is to be in force in Israel after the declaration of independence 'with such modifications as may result from the establishment of the State and its authorities') or even without that section and without any reference to it. The State of Israel sends its ships to the high seas under its own flag. The people on board those ships are protected by its flag and enjoy its laws and jurisdiction. For these reasons I see no obstacle whatever to its courts extending their authority to all persons in those ships and trying them in accordance with its laws, as any other enlightened State will do in respect of ships flying its flag and the persons on board thereof. In other States—in England, for instance—such matters come within the jurisdiction of the admiralty courts and not of the ordinary common law courts (although in England, the Central Criminal Court is today vested also with jurisdiction over offences committed within the sphere of competence of the Admiral). In the State of Israel, on the other hand, all criminal matters come within the jurisdiction of the District Courts, pursuant to Article 40 of the Order-in-Council, although there is also a Maritime Court. But this difference, *i.e.*, the separation of powers and the assignment of jurisdiction to two distinct sets of courts in England and their concentration in one court in Israel, cannot in itself be a reason for artificially eliminating the international principle from the law of this country. ' It is necessary for some Court to have jurisdiction over a crime committed on a . . . ship ', as Justice Humphreys said in the *Finlayson* case, and I see no court more competent in this respect than a court in Israel in the case of an Israel ship and an offence committed therein, and than the District Court of Haifa, in whose area of jurisdiction the appellant resides. As for the restriction imposed by section 6 of the Criminal Code Ordinance, it has been said above that that section is subject to the provisions of section 3 (b), and the word ' law ' in this latter sub-section includes, in my opinion, not only the laws enumerated in the definition of ' law ' in section 5, but also the general principles accepted in public international law. The list given beside the term ' law ' in section 5 is not exhaustive, as it begins with the word ' includes ' (unlike the definitions of ' misdemeanour ', ' court ', ' felony ', ' municipal authority ', etc., in the same section, which all begin with the word ' means ') and does not exclude other laws.

" Counsel for the appellant has relied also on Article 38 of the Order-in-Council in support of his contention that the civil courts have jurisdiction only in matters and over persons in Israel, and that the local courts have no authority over a person who has committed an offence abroad. To this, a twofold reply may be given. First (as explained at length above), for the purpose of the jurisdiction of the Court—as distinct from any other matter, such as nationality, birth, the making of a will, etc.—a ship sailing the high seas under the flag of the State of Israel is regarded as a part of the State itself. It follows that the ship is ' a place within Israel ' to which the jurisdiction of the courts of the State of Israel extends under section 6 of the Criminal Code Ordinance, and a criminal act alleged to have been committed in it is one of the matters referred to in Article 38 of the Order-in-Council. Secondly, I endorse the view expressed by Justice Vitkon in *Heirs of Shababo* v. *Heilen and Others* (*International Law Reports*, 1953, 391 at p. 393), with one reservation. . . . My only reservation is that, as I have tried to explain above, for the purpose of incorporating the principles of international law in the law of Israel, we need no longer today, after the establishment of the State, have resort to Article 46 of the Order-in-Council. The same motives as, for instance, justified the reception into the common law of the principle of the extension of the jurisdiction of English courts over ships sailing the high seas under the British flag exist with regard to the State of Israel and justify the incorporation of that principle into Israel law, without any reference to English law or to the local statute law. As to the nature and origin of those principles, it seems to me that I can do no better than give, verbatim and in the language of the original, a passage from an old

English judgment, quoted in 77 E.R. 1357 from 12 Coke Reports 79:

> ' [T]he admiral hath jurisdiction to adjuge things done upon the sea . . . and this did not begin then: but without question, so long as there hath been trade and traffic (which is the life of every island) there was marine jurisdiction to redress depredations, piracies, murders and other offences upon the sea; and to determine all contracts made there; and this doth appear by . . . Beresford, Chief Justice, (who speaks in the voice of all the Court) where he says, that the King willeth that the peace be as well kept upon the sea as upon the land; and it is not possible that the peace should be kept without jurisdiction of justice.'

The conclusion of the Court in that case was that—

> ' [T]he Admiral by the common law hath jurisdiction upon the high sea, *ex quo sequitur*, that his jurisdiction was by the common law and that it is so ancient, that the commencement cannot be known . . .'

" As to the question of the incorporation of the principles of international law in the national law, we rely on Blackstone, *Commentaries on the Laws of England*, IV, cap. 5:

> ' . . . [I]n England . . . the law of nations . . . is . . . adopted in its full extent by the common law, and it is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law . . . are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom: without which it must cease to be a part of the civilized world.'

The same goes for other countries, such as the United States of America, France, Belgium and Switzerland, where the usages of international law have been recognized as part of the national law, though some of these countries uphold the principle of the territorial jurisdiction of their courts (see Oppenheim's *International Law*, *loc. cit.*, pp. 39–41).

" To recapitulate: when the State prosecuted the appellant for the offence it imputed to him, it did so not only in virtue of its written laws, but also in virtue of its sovereignty and in virtue of the jurisdiction of its courts over ships on the high seas flying its flag. No national or international principle has thereby been infringed by it, and thus it cannot be impugned on that account. For this reason I would dismiss the preliminary plea of Counsel for the appellant concerning the jurisdiction of the District Court of Haifa."

Goitein J., in his Separate Opinion, which is devoted mainly to an analysis of the relevant legislation of Israel and of the Mandatory Power prior to the independence of Israel, said in part: " I thus answer affirmatively the first question—as to the application of the provisions of the Admiralty Offences Act to a Mandated territory —and will now deal with the second, *viz.*, whether the provisions of the Admiralty Offences Act should be regarded as not referring only to British ships.

" As stated, the Act itself uses the words ' Place where the Admiral or Admirals have Power, Authority, or Jurisdiction '. It is well known that in the course of the years the power of the Admirals has steadily widened, until a stage has been reached where that power is no longer limited only to British ships, but extends to all vessels of all the different kinds of colonies. This is apparent also from the wording of the above-quoted section 5 (2) of the Foreign Jurisdiction Act which, as will be remembered, extends the jurisdiction vested in the Crown by the laws enumerated in the schedule to that Act as if the foreign country were a ' British Possession '. True, Mandated Palestine was not regarded as a British possession, but section 5 (2) of the Foreign Jurisdiction Act equates—for the purposes of the application of the laws enumerated in the schedule to that Act—the foreign countries where the Crown has certain powers to countries regarded as British possessions.

" In *Sharp and Sons Ltd.* v. *The Catherine MacKall* ((1924) 34 C.R.L. 420), referred to in Burrows, *Words and Phrases*, *s.v.* ' British Possession ', we read, *inter alia*, the following:

> ' By sub-s. (2) of s. 18 of the Imperial Interpretation Act, 1889, the expression " British possession " is defined as meaning any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both central and local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession; . . .
>
> ' . . . As the definition stands, we think the Commonwealth (of Australia) is a British possession . . . It was not argued that the Colonial Courts of Admiralty Act (53 and 54 Vict., c. 27) contained any indication of intention that the expression " British possession " when used therein should not have the meaning assigned to it by the Interpretation Act, 1889. If the expression be given that meaning, the Commonwealth is a British possession, and it follows that the High Court is a Colonial Court of Admiralty.'

In the New Zealand case of *Godwin* v. *Walker* ((1938) N.Z.L.R. 712), also quoted *s.v.* ' Possession ' in Burrows's aforementioned book, Justice Callan said:

> ' I have no doubt from this definition of " British Possession " (see Fugitive Offenders Act, 1881, s. 39) that this expression is used in the statute as descriptive of a geographical area—and not as a political description.'

" These quotations show that for the purposes of the laws under discussion, *viz.*, the Admiralty Offences Act and the Foreign Jurisdiction Act, Mandated Palestine may be regarded as a British possession, and I therefore think that it will not be too bold a jump if we regard also Palestinian ships as ships over which the Admiral or Admirals had jurisdiction. I see no point in restricting the meaning of the words ' place where the Admiral or Admirals have Power ' to British ships, to the exclusion of Palestinian ships.

" Having disposed of this difficulty, we are able to apply the Admiralty Offences Act to Israel ships and to regard the ordinary Israel courts as competent to deal with offences committed on such ships. I find support for this view in the judgment of my colleague, Justice Silberg, in *Diab* v. *Attorney General* [*International Law Reports*, 1952, Case No. 115] . . . Those words of Justice Silberg show clearly that in his opinion the Government of Israel may be vested with certain powers originally conferred on the institutions of the Mandated territory, and this without promulgating a special enabling law, merely by reference to section 11 of the Law and Administration Ordinance; he regarded the textual changes required for vesting those powers in the State of Israel and its Government as ' such modifications as . . . arise from the establishment of the State of Israel and its authorities ' . . .

" If the Courts of Mandated Palestine were vested with the powers mentioned in the Admiralty Offences Act—and I think that they were—I see no reason why those powers should be withheld from the Israel Courts. Quite the contrary: if the Courts of Mandated Palestine, which was not a sovereign State and the powers of whose authorities were therefore much more limited than those ordinarily vested in an independent nation, were able to try a person for an offence committed abroad, is it not obvious that the authorities of the sovereign State of Israel, which is no longer subject to the restrictions imposed on the Mandatory legislator, should be able to do so? In my opinion, this power was in fact transferred to the Israel Courts by the provisions of section 11 of the Law and Administration Ordinance. Our second question should therefore be likewise answered affirmatively and—for the purposes of the matter before us—' British ship ' should be deemed to include ' Palestinian ship ', and hence also ' Israel ship '.

" At this stage of our analysis, we should give consideration to the contention of Counsel for the respondent that every ship flying the flag of the State of Israel should be regarded as Israel territory. Counsel for the respondent regards such a ship as a kind of ' floating island ' of the State of Israel. Let it be said at once that this ' floating island ' theory does not commend itself to me at all. It originates in *obiter dicta* scattered over several English judgments of the nineteenth century, the authors of which did not intend at all that their words should provide a foundation for such a flimsy, odd construction. The term appears for the first time—as far as I am aware—in the period when slavery was still an institution recognized by the legal systems of many civilized States. The British in those days led the fight for its abolition, and gave sanctuary on their ships to slaves who had run away from their masters. This was the background of the well-known case of *Forbes* v. *Cochrane*, (*supra*), in which, to the best of my knowledge, the ' floating island ' theory is referred to for the first time, though only incidentally and without relevance to the actual issue. . . . [The Judge also referred to *Reg.* v. *Anderson* (*supra*), and continued:] About a century after these judgments, a British Court dealt a heavy blow to the ' floating island ' theory—in fact, finally disposed of it—in *R.* v. *Gordon-Finlayson*, (*supra*). This shows clearly that this judgment not only categorically rejects the ' floating island ' theory, but sheds light on the problem before us by clarifying the sources from which the ' floating island ' concept originates. On the other hand, the quotation [by Justice Humphreys] from Hall leads us to the further question whether we may resort to the principles and rules of public international law in cases where the Knesset has not yet seen fit to convert them into binding legal rules of the State. Public international law has, as is well known, evolved various tests to determine jurisdiction in cases of offences committed in ships on the high seas. In " Le Régime Juridique des Navires de Commerce " (*Recueil des Cours of the Hague Academy of International Law*, Vol. 30 (1929), the Englishman Pearce Higgins, who too relies on Hall in this matter, says (cap. III, p. 27):

' Il n'y a pas de principe de droit international plus universellement reconnu que celui d'après lequel les navires de commerce en haute mer sont placés sous la juridiction administrative, civile, criminelle et sous la protection de l'Etat auquel ils appartiennent.'

" As already stressed at the outset, the rules of public international law do not form part of the law of the State, in the sense of the definition of this term in section 3 of the Ordinance. I do not like to decide an issue of such fundamental and far-reaching importance without first hearing the arguments of the parties. It is surprising that in the present case the parties should have avoided going to the root of the matter, that they should, in fact, have altogether refrained from raising the points connected with this interesting problem.

" It is beyond dispute that the Knesset may introduce into the law of the State, through the usual process of legislation, any rule of international law it thinks fit, and that it may also pass one single general law incorporating the principles of international law into the law of the State. Up to now, the Knesset has taken neither of these courses. The Mandatory Government, too, refrained from following this line, which today is increasingly adopted in many countries. Therefore, in my opinion, we cannot base the solution of our problem on the principles and rules of international law, but must rely solely on the provisions of the law of the State.

" The present legal position is by no means satisfactory, witness the fact that in these very days a Bill has been tabled in the Knesset with a view to regulating the jurisdictional problems arising in connection with offences committed in Israel vessels or aircraft outside the Israel borders.[1] That Bill is indeed most timely. The State of Israel is a sovereign State, and it is doubtful whether it can content itself with English laws made over a century ago for application in the colonies of the Empire, which, moreover, was greatly different in character from what it is today. There is no need to stress how far such laws are from meeting the requirements of the State of Israel. Even if these British laws grant us the power to try offences committed on the high seas, there remains a very great number of problems not solved by them or by the interpretation given to them in judicial decisions. With the growing use of air transport, at a time when the number of aircraft passengers far exceeds that of ships' passengers, we should also attend to the regulation of the legal questions which arise from the development of that modern means of conveyance. There further arises a host of questions relating to the application of Israel law to foreign nationals being in an Israel vessel or aircraft.

" I have mentioned only some of the many problems still awaiting solution. I do not propose to answer them here for different reasons. First, they have no direct bearing on this case; and secondly, it cannot, in my opinion, be expected of the Court that, under the pretence of interpreting the law, it engage in the work of legislation, which is the function of the Knesset. But so long as the Knesset abstains from regulating the questions relating to the power of the Court in respect of offences committed outside the State of Israel, the Court is bound to see to it that ships flying the Israel flag are not ruled by the law of the jungle, and we should do our best to apply in such cases the English law extended to Palestine by Article 35 of the Order-in-Council of 1922.

" I therefore think that the court in whose area of jurisdiction the appellant was had power to hear and determine the case."

[Reports: *Piskei-Din*, 10 (1956) p. 5; *Pesakim Elyonim*, 21 (1956) p. 298.]

NOTE.—By the Area of Jurisdiction and Powers Ordinance (Amendment) Law, 5716–1956, enacted on February 14, 1956, it was provided that any vessel or aircraft, wherever situated, which is registered in Israel shall, for the purpose of the jurisdiction of the Courts, be deemed to be a part of the area of the State of Israel.

[[1] For the law as ultimately adopted after this judgment was rendered see the Note at the end of this report.]

PART V

STATE RESPONSIBILITY

A—NATURE AND KINDS OF STATE RESPONSIBILITY

III.—For Revocation of, or Interference with, Concessions or Concessionary Contracts

State Responsibility—For Interference with Concessionary Contracts—Failure of Grantor Government to Lend Assistance in Collection of Dues—Effect of Clause in Contract Excluding Right to Claim Compensation—Inability of Claimants to Establish Amount of Loss—Award of Token Damages.

Lighthouses Arbitration between France and Greece.

Claim No. 5.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

The Facts.—(See *infra*, p. 659.) This was a claim by Collas & Michel for compensation for loss of revenue caused by the failure of the Greek Government to " lend its authority " to their collection of lighthouse dues.

Held: that the claim must succeed. The Greek Government had failed in its clear duty under the terms of the concessions to assist in ensuring the collection of dues. A clause in the contract which excluded the right to claim compensation from the Government did not relate to claims such as the present.

The Tribunal said: " This claim arises from a charge of some gravity alleging the negligence or even a blank refusal on the part of the Greek Government, between 1914 and 1916, to lend its authority to Collas & Michel in the collecting of the lighthouse dues in New Greece. The Greek Government endeavoured, it is true, during the written and oral proceedings, to minimize as much as possible the seriousness of the charge, contending that it had taken all necessary measures to compel the local authorities of the newly acquired regions to respect the concessionary rights, but that contention is not at all convincing. On the contrary, one has but to read the report of the Greek inter-departmental commission of 1935 relating to this claim to realize that the Government failed in its duty under Article XIV, paragraph 7, of the concessionary contract of 1860 (as continued in force) to see that the assistance of the maritime authorities was given to the concessionaires in order to ensure the collection of dues from the various shipping lines. This plain duty of the grantor State is in no way negatived by the clause in paragraph 8 of the same Article under which the collection of lighthouse dues was to be effected in the name of the Government by the concessionaires 'without the latter being able to claim in respect thereof any compensation from the Government'. The object of these words was in no way to abrogate the duty, which had just been defined in the preceding paragraph, to assure to the concessionaires all necessary assistance on the part of the maritime authorities or to relieve the grantor State from its financial responsibility for any subsequent shortcoming in its duty of assistance; it was to exclude, on the one hand, any remuneration for the services rendered by the concessionaires to the State and, on the other hand, direct claims on the Government in case of evasion of dues on the part of the shipping companies, in the event of their insolvency, and in other cases of a like nature. The grantor State would not therefore be responsible for the wrongs of any other person, but it would remain normally responsible for its own wrongs."

The Tribunal held that this claim had been proved to be sufficiently well founded, but, the claimants not being able to establish the amount of their loss, the Tribunal, "while recognizing in principle the justice of the claim", awarded the claimants a token sum of one franc.

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 100.]

NOTE.—See also *Claim No. 1a,* in which the Tribunal observed that among the ships which were the subject of *Claim No.* 1 (see *infra,* pp. 801 and 341) were, besides requisitioned vessels, a number of ordinary steamers. The Tribunal regarded these as ships in respect of which the Greek Government had failed to "lend its authority" to the collection of lighthouse dues and *held* that the claim of Collas & Michel must succeed in respect of these ships. The Tribunal said: "*Claim No.* 1 . . . appeared, in fact, in the course of the proceedings to comprise arrears of lighthouse dues not only from private ships requisitioned for military or paramilitary service, but also from packet boats and similar vessels. If the [Greek] Government was at fault in not having done what was necessary in order to compel the captains of the small boats particularly mentioned under *Claim No.* 5 to pay the dues, it was the more so with regard to the mail-boats comprised in the mass of ships enumerated in detail by Collas & Michel in the classified lists produced in connection with the head of *Claim No.* 1. In that case, the Greek Government ought to, and could, have exercised a much more direct influence on the captains and on the shipping companies, to make them pay the lighthouse dues. But instead of giving such orders so as to fulfil its contractual duty as defined in Article XIV, para. 7, of the concessionary contract of 1860 (as continued in force), the Greek Government rather countenanced their refusal to pay the dues and did nothing afterwards to remedy the situation." The Tribunal noted that in the classified lists appeared not only a large majority of Greek ships but also some which flew other flags, *e.g.*, American or Belgian. The Tribunal gave the Greek Government liberty to lodge, if thought necessary, concrete objections to such items on the list or to bring countervailing evidence relative thereto. [Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 101.]

State Responsibility—For Revocation of Concessionary Contracts—Absence of Responsibility for Retirement Pensions Paid to Members of Staff of Concessionaires on Moral or Humanitarian Grounds.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claim No. 18.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *infra*, p. 659.) Collas & Michel claimed compensation for the amount of certain retirement pensions which they had felt themselves obliged to allow certain ex-members of their staff whom they had to dismiss after the cancellation of their concession. The firm conceded that they were under no legal obligation to grant these pensions and that they did so for purely moral or humanitarian motives.

Held: that the claim must fail. Compensation was not payable for payments made on moral or humanitarian grounds.

The Tribunal said: " [The fact that the firm conceded that the payments were not made under any legal obligation] in itself presents an obstacle to the adjudication of a claim referred to it by a Tribunal set up to decide according to law. To allow such a claim would amount, in fact, to charging one of the parties with the financial consequences of a humanitarian gesture which the other felt itself in conscience bound to make for motives of a moral kind. Such a claim, which would disregard the essential characteristics of such motives, must be rejected."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 120.]

State Responsibility—For Interference with Concessions—Compensation for Forcible Termination of Concession Before Due Term—Treatment as "Redemption of the Concession"—Measure of Damages—Amount of Revenue Lost by Concessionaire—Method of Calculation—Currency of Payment—Effect of Devaluation of Currency—Choice of Stable Intermedium for Calculation of Amount Awarded.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claim No. 27.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *infra*, p. 659.) This claim was mentioned separately, as one of the objects of the arbitration, in Article 7 of the *Compromis* of July 15, 1931, as "the fixing of the sum payable for the redemption of the concession"—a formula which was nowhere found in the text of the four successive concessionary contracts between Turkey and Collas & Michel, but which corresponded substantially with the various provisions concerning the determination of the concession before it had run its full course.

The original provision was contained in Article XIV of the concession of 1860 and was as follows:

> "(1) It is understood that if the Ottoman Government think it proper to take over the lighthouse service it shall be entitled to do so at any time, however many years the concession shall still have to run, subject to compensation which shall be settled between the interested parties or in default of agreement by arbitration.
>
> "(2) In any other case than mentioned hereinafter (that is to say, in case of war, either between the Porte and another Power or between the Allies of the Porte signatories of the Treaty of Paris of 1856) the concessionaires are to receive such compensation before being deprived of their contract."

This was, then, a matter of a taking over of the lighthouse service by "depriving the concessionaires of their contract" subject to prior compensation to be settled by agreement or if necessary by arbitration.

Article XX, "being regarded as null and void" by Article VII of the first (1879) contract extending the concession contracts, was therefore replaced by a new provision which, without any mention of the contract coming to an end in the event of war, stipulated that

> "... it remains understood that the Imperial Government still retains the right to take over the lighthouse administration however many years the concession shall still have to run, subject to the payment of all compensation which may be determined by the parties or by arbitration

in case of failure to agree. In any case the Imperial Government is to pay such compensation before the lighthouse administration passes into its hands, or at least guarantee the payment thereof."

This clause was not repeated in the two subsequent extension contracts of 1894 and 1913 respectively, but was contained in them by implication, as the contract was each time extended " subject to existing general provisions ".

On January 1, 1929, the Greek Government seized the lighthouse administration of Collas & Michel, without compensation.

Held: that the claim for compensation must succeed. The firm were entitled to be treated in the same way as if the grantor State had taken over the lighthouse service under the concessionary contract. The amount payable to the firm must equal that of which they had been deprived by the wrongful termination of the concession twenty years before its due term. The compensation must be assessed on the basis of data available at the date of the termination, by calculating the net annual profits which Collas & Michel would have derived from the concession had they operated it over the twenty years in question. An inquiry was ordered into the details of that calculation.

The Tribunal said: " The operation of the ' taking over of the lighthouse service (or administration) ', a unilateral act of authority of the grantor State, is indicated in the *compromis* by the words ' redemption of the concession ', an expression well known in administrative law and meaning precisely the unilateral act of a grantor State.

" The substance of the provision relating to the ' taking over ' clause remained, in consequence, the same during the whole of the period of the concession from 1860; the grantor State is to have the right at any time to put an end unilaterally to the existence of the concession, but on one fundamental and strict condition, not to proceed to that unilateral operation before paying the concessionaire—or, at least, before guaranteeing the payment of full compensation previously determined by the parties themselves or, in case of disagreement, by arbitration. That condition is, indeed absolutely essential and is the sole effective safeguard of the rights of the concessionaire against possible abuse by the grantor State of its public power, as the history of concessions everywhere has abundantly shown.

" By its seizure of the lighthouse administration of Collas & Michel from January 1, 1929, without payment—or guarantee of payment—on account of compensation, determined in conditions which would ensure that it was equitable, the Greek Government, regarded as successor by subrogation to the concession, committed an act which was contrary to one of the essential provisions of the contract.

" The concessionaire firm have from this fact, therefore, the right to compensation for the redemption of the concession which ought, so far as possible, to be equal to the benefit of which they have been deprived by reason of the forcible taking over of the concession 25 years before its due expiry. To assess the compensation, reference must be made to the data on which took place the wrongful act [*voie de fait*] of the Greek Government which gave rise to that right to compensation and the damage suffered by the firm can only be assessed by reference to data existing at the time when the concession was taken over. Subsequent events, which were unforeseen at that time both by the Greek Government which seized the concession and by the firm which was dispossessed of it, cannot be taken into consideration in a case of a grant of compensation which ought to have been not only determined but also put at the disposal of a concessionaire before the latter's removal. The Greek argument, which would take into account subsequent events, and which would be to the advantage of Greece, must therefore be rejected. The Tribunal adopts the opinion expressed by the Franco-Italian Conciliation Commission concerning certain claims of the same concessionaire, dated November 21, 1953 (Decision No. 164), that, in an exactly comparable situation, it was not only equitable but also in conformity with the terms of the concession to put the firm in the position in which it would have been if the redemptiom had been effected *de facto* and formally at the moment of the taking over of the lighthouses.[1]

" That is the only method which appears to the Tribunal admissible for the determination of the value of the redemption in the present case. It would be quite impossible to assess it on the basis of the residual amortization value of the buildings, as the firm has clearly shown in their explanatory memorandum concerning this head of claim. . . .

" The Tribunal, therefore, in order to determine the value of the concession in 1928 as though the taking over at that date had been legitimate, will first assess the ' average value of the operation ' of the concession per year, by calculating successively the annual receipts of the concessionaire and his corresponding expenses in order to arrive at the net annual profits which he would derive from the concession; it will then ascertain how the absence of profits thus calculated should be expressed as one total sum to be allowed to the concessionaire as compensation for dispossession effected twenty years before the due determination of his contract.

" In order to ascertain the average annual net profit, the Tribunal thinks it proper to apply the well known system which consists of taking as bases of calculation the years immediately preceding the redemption, that is to say, the years 1925 to 1928. These years present an advantage relative to the previous years in that they belong to the period of the fourth concession, which began on September 4, 1924, and the formula for sharing the receipts is thus the same as that which relates to the years of the concession for which compensation is claimed.

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[1] See *Recueil des Décisions*, Part 4, p. 281 [*International Law Reports*, 1953, p. 634, Note].

"But the calculation of annual profit for the years above mentioned presents certain difficulties, due in the first place to the fact that the data on which the Tribunal ought to base it are in dispute and to the fact that several of these points will be definitively cleared up only at a later stage in these proceedings.

"Moreover, there is a difficulty of quite another kind in the assessment of the compensation which should be awarded to the concessionaire: the intrinsic value of the currency in which the net profit for the years 1923–1928 is to be calculated is quite different from that in which the Tribunal ought to assess the amount of the compensation for redemption. In order to determine the indemnity to which the concessionaire firm are entitled as a result of the unlawful act committed in breach of the concession contract, the Tribunal is of the opinion that it can only assess the damage suffered by the firm under this head in the currency adopted in the present award. The arguments put forward on behalf of Greece, to the effect that that compensation should be assessed either in drachmae or in francs current at the date of dispossession, would have the result of making the firm bear the effects of the devaluation which those two currencies have undergone since 1929, which would bring about the reduction of the claim to nothing (if in drachmas) or to one-tenth (if in francs). Such arguments cannot be accepted, because the injured party has the right to receive the equivalent at the date of the award of the loss suffered as the result of an illegal act and ought not to be prejudiced by the effects of a devaluation which took place between the date at which the wrongful act occurred and the determination of the amounts of compensation. To this end, the Tribunal must as far as possible use as intermedium a stable currency and as such it accepts that which has been put forward by the French agent, namely, the United States dollar. That currency, which remained relatively stable during the critical period, presents nevertheless in relation to gold a certain devaluation favourable to the debtor. The Tribunal does not believe that it can employ a stricter method than that which has been asked for. By this method, the net annual profits will be converted into American dollars at the average rate for each year, the average of the annual profits in dollars will be assessed in accordance with the principle indicated above and then that average will be multiplied by the number of years during which the firm was deprived of its concession, that is, 20.68 years (from January 1, 1929, to September 4, 1949). Finally, the amount obtained in dollars will be converted into French francs at the dollar rate on the day on which the definitive award determining the compensation is given. The receipts will be assessed in accordance with the principles laid down by the Tribunal in regard to *Claim No.* 26[1] and will be taken into consideration in ascertaining the sums remaining to the firm after deduction of the part belonging to the State. . . .

"As regards expenditure, the Tribunal has already considered this problem in connection with the Greek *Counterclaims No.* 3 *to* 6,[2] and in view of the impossibility of arriving, with the documents at its disposal, at a satisfactory solution, it has decided to order an enquiry by an expert with a view to determining the annual sums which Collas & Michel would have had to spend from 1915 to 1928 for the maintenance and the operation of the lighthouses in the zone of New Greece, if they had been allowed to remain in possession of them. The same difficulties present themselves in connection with the determination of the expenditure which is to serve as a basis of the calculation of the compensation or redemption.

"The difference between the bases of assessment of this compensation and those for calculating the compensation due to Greece under the head of her *Counterclaims No.* 3 *to* 6 consists in the fact that the expenditure to be taken into account in determining redemption moneys ought to comprise not only the cost of the maintenance and of the operating of the lighthouses in the zone of New Greece, but also the cost of collection in that zone and a fair share of the general expenses of administration. Indeed, during the years under consideration, from 1915 to 1928, the firm continued to collect the lighthouse dues, while the Greek Government undertook at its own expense the maintenance and the technical operation of the lighthouses which it had seized in 1915.

"For the reasons which have been set out in connection with *Counterclaims No.* 3 *to* 6, it is necessary to take, in this case also, as a basis of calculation in connection with the cost of maintenance and operation, not the actual expenses of the Greek Government but rather the expenses which Collas & Michel would have had to incur if the Greek Government had not seized the lighthouses.

"That is why the Tribunal cannot accept as a basis for calculation the figures put forward by the Greek Government and reproducing purely and simply the total expenses which it has devoted to technical operation of the concession—figures which it submitted in refutation of those originally put forward by Collas & Michel on the basis of an approximate assessment of the expenses which they would have had to incur themselves in that direction, if they had been left in possession of the lighthouses. In fact, as the French agent has properly observed, a State's operating costs are normally extremely [*abusivement*] heavy. In consequence, a method which consists of taking the effective expenditure by Greece as the basis of a calculation the purpose of which is to separate the total of the operating costs which the firm themselves would have normally had to bear if they had continued with the operation during the period in question is not acceptable. . . .

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[1] See *infra*, p. 342.]

[2] See *supra*, p. 99.]

" In these circumstances, the Tribunal is led, in connection with Claim No. 27, as it was in regard to *Counterclaims No.* 3 *to* 6, to order, on the same terms, an expert enquiry so as to assess in drachmas the annual sum which Collas & Michel would normally have had to expend in New Greece from January 1, 1915 to December 31, 1928, for the operation of the concession. It will, of course, be proper for the experts to include in that expenditure the cost of collection and a fair share of the general expenses of administration."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 132.]

State Responsibility—For Interference with Concessionary Contracts—Expenditure on Contract Rendered Abortive by Insistence on Unacceptable Conditions—Sharing of Responsibility.

See p. 81 (*Lighthouses Arbitration between France and Greece—Claims No.* 11 *and* 4).

State Responsibility—For Interference with Concessionary Contracts—Derogation from Lighthouses Concession—Grant of Exemption from Dues to Steamship Company.

See p. 81 (*Lighthouses Arbitration between France and Greece—Claims No.* 11 *and* 4).

IV.—For Debts

State Responsibility—For Debts—Liability to Pay Dues Tripled Retrospectively by Decision of Allied Powers Maintained in Force by Subsequent Treaty Provision—Article 137 of Treaty of Lausanne, 1923—Liberal Interpretation of Treaty—Supremacy of Treaty Provision Over Private Law Rule as to Extinction of Debt.

Lighthouses Arbitration between France and Greece.
Claim No. 3.

Permanent Court of Arbitration. July 24, 1956.
(Verzijl, President; Mestre, Charbouns.)

The Facts.—(See *infra*, p. 659.) This claim related to the non-payment by Greece of a retroactive tripling of lighthouse dues owing by her for requisitioned ships using the port of Constantinople in 1919. The Greek Government paid these dues in December 1921. Subsequently, the Allied High Commissioners in Constantinople, by their decision of January 7, 1922, tripled the tariff with retroactive effect to May 17, 1919. The Constantinople office of Collas & Michel submitted to the Greek High Commissioner at Constantinople a request for the additional amount payable as a result, but payment was not made. During the present proceedings, the argument was advanced on behalf of Greece that the latter was not obliged to pay this supplementary amount, for a reason taken from civil law, *viz.* Greece having paid her debt on December 14, 1921, was discharged therefrom; the debt was extinguished and could no longer be brought into account, " not even as the result of a decision of the Allied High Commissioners." It was also contended that Article 137 of the Treaty of Lausanne, which maintained in force certain decisions of the Allied High Commissioners, could not be so interpreted as to cover the decision of January 7, 1922.

Held: that the claim must succeed. Article 137 of the Treaty of Lausanne covered the decision tripling the lighthouse dues, notwithstanding the payment by Greece of the dues before the date of the Allied High Commissioners' decision.

The Tribunal said: " The Tribunal . . . sees no valid reason to deny to the words of Article 137 of the Treaty of Lausanne the juridical effect of making the decision of January 7, 1922, of the Allied High Commissioners binding on Greece. That Article provides:

> " ' Subject to any agreement concluded between the High Contracting Parties, the decisions taken and the orders issued since the 30th October, 1918, until the coming into force of the present Treaty, by or in agreement with the authorities of the powers who have occupied Constantinople, and concerning the property, rights and interests of their nationals, of foreigners or of Turkish nationals, and the relations of such persons with the authorities and Turkey, shall be regarded as definitive and shall give rise to no claim against these Powers or their authorities. . . . "

" Nothing in this provision permits the giving to it of a restrictive interpretation which excludes the decision tripling the lighthouse dues. The argument drawn from the extinction of the debt under private law can succeed only in the absence of the express provision of the Treaty of Lausanne. This claim is therefore admitted."

[Report: *Protocoles des Séances, etc.* (*Affaires des Phares*), p. 92.]

State Responsibility—For Debts—Debts of Wartime Puppet State —Debts of Independent State of Croatia.

See p. 591 (*Re Dues for Reply Coupons Issued in Croatia; Re Transit Charge for Mails from Occupied Yugoslavia*).

V.—For Other Breaches of Contractual Obligations

State Responsibility—For Breaches of Contractual Obligations—Allegation of Breach of Contract of Sale—Finding that No Binding Agreement Reached—Allegation of Delay in Presenting Claim—Prescription—Absence of Rule of International Law Laying Down Time Limit—Right of Claimant to Change Legal Basis of Action—Substitution of Claim to Arbitrate under Treaty for Claim Based on General International Law—Most-Favoured-Nation Clause—Nature of—Power to Attract Only Matters of Same Category of Subject—" Administration of Justice " as Subject Allied to " Commerce and Navigation "—Inability to Incorporate in Treaty Provisions of International Law—Interpretation of Treaty—Interpretation of Expressions " justice ", " right " and " equity " by Reference to Rules of Municipal Law of Signatory—Interpretation of Expression " free access to the courts "—What Constitutes Denial of Access—Defence of Non-exhaustion of Legal Remedies—Burden of Proof in Arbitration Proceedings—Need to Prove Existence of Remedies Not Used—Contention that Available Remedies Ineffective—Test of Assumption of Truth of Facts Claimed—Need for Exhausting Whole System of Legal Protection of Municipal Courts—Failure to Call Available Witness—Failure to Exhaust Appellate Rights—Failure to Put Forward Claim in Municipal Courts.

AMBATIELOS CLAIM (GREECE *v.* UNITED KINGDOM).

Arbitration Commission. March 6, 1956.

(Alfaro, President; Bagge, Bourquin, Spiropoulos, Thesiger.)

THE FACTS.—By a contract dated July 17, 1919, Nicholas Eustache Ambatielos, a Greek shipowner, agreed with the United Kingdom Government (represented by Sir Joseph Maclay, the Shipping Controller) to purchase nine steamships, then building in the dockyards of Hong Kong and Shanghai, at a price of £40 per ton for vessels of 5,000 tons and of £36 per ton for vessels of 8,000 tons, the total purchase price amounting to £2,275,000. The negotiations resulting in this contract were conducted on behalf of the United Kingdom Ministry of Shipping by Major Bryan Laing and on behalf of Nicholas Ambatielos by his brother, G. E. Ambatielos.

Paragraphs 2, 3 and 7 of the contract of July 17, 1919, contained the following provisions:

> " 2. The purchase money for the said steamers and engines shall be paid as follows:
>
> A deposit of ten per cent. in cash payable as to £1,000,000 thereof upon signing this Agreement and as to the balance of the said deposit within one month thereafter and the balance in cash in London in exchange for a Legal Bill of Sale or Builders' certificate within 72 hours of written notice of the steamer's readiness for

> delivery being given to the Purchaser or his Agent, such delivery to be given at the Contractor's yard.
>
> "3. The steamers shall be deemed ready for delivery immediately after they have been accepted by the Vendor from the Contractors.
>
> "7. If default be made by the Purchaser in the payment of the purchase money the deposit shall be forfeited and the steamers may be re-sold by public or private sale and all loss and expense arising from the re-sale be borne by the Purchaser, who shall pay interest thereon at the rate of five pounds per cent. per annum. If default be made by the Vendor in the execution of Legal Bills of Sale or in the delivery of the steamers in the manner and within the time agreed, the Vendor shall return to the Purchaser the deposit paid with interest at the rate of five pounds per cent. per annum."

The written contract was, however, signed without any dates being inserted. When N. E. Ambatielos found that the contract did not contain specific dates he, according to his subsequent evidence, told his brother that he was going to repudiate the contract. However, Major Laing called on N. E. Ambatielos in Paris at the end of August 1919 and assured him that the ships would be delivered on dates certain which had been written down on a buff slip of paper. This buff slip of paper, the existence of which was never in dispute, contained dates certain. They were obtained by a Mr. Bamber, an official of the Ministry, from his records which contained reports from the dockyards. In the event, the ships were delivered later than had been anticipated. Freight rates having fallen heavily in the meantime, considerable loss was suffered by the purchaser.

In November 1920, the purchaser, N. E. Ambatielos, was indebted to the United Kingdom Government in a large sum of money. For the purpose of guaranteeing this debt he executed mortgage deeds and covenants on November 4, 1920, on seven ships. The last two ships mentioned in the mortgage, the *Mellon* and the *Stathis*, which had been bought by Ambatielos, were never delivered to him. The contract for these two ships was not cancelled, and the ships were laid up from the date when they should have been delivered until the date of Mr. Justice Hill's judgment of January 15, 1923, hereinafter referred to. During that time the cost of insurance and other expenses were charged to Mr. Ambatielos. In February 1921, N. E. Ambatielos, through his brother, proposed that the purchase of these two ships be cancelled, but his offer was refused by the United Kingdom authorities.

Ambatielos went to London in May 1921 and engaged in negotiations with Sir Ernest Glover, representative of the Ministry of Shipping, who, according to Ambatielos, showed a conciliatory attitude. According to the Greek Government, Sir Ernest Glover consented to reduce the agreed price by £500,000, but the United Kingdom Government denied that any agreement was concluded. Meanwhile, Ambatielos had claimed arbitration (under Clause 12 of the contract of July 17, 1919) and arbitrators had been appointed.

The Board of Trade, as successors to the Ministry of Shipping, however, instituted proceedings in the Court of Admiralty on the mortgage deeds of 1920 and, in consequence, by agreement between the parties, the claim of Ambatielos was put forward by way of defence to these proceedings, instead of being dealt with by arbitration. Mr. Justice Hill heard the case in November 1922, and on January 15, 1923, gave judgment for the United Kingdom Government for possession and sale of certain vessels which had been delivered, and for principal and interest due under the mortgage deeds.[1]

During those proceedings the United Kingdom Government, in accordance with the practice of Ministries, refused to produce certain interdepartmental minutes. Furthermore, letters exchanged in July 1922 between the former Controller of Shipping, Sir Joseph Maclay, and Major Laing, referring to assurances said to have been given by the latter to Ambatielos about delivery dates, were not produced in court. Major Laing and Sir Joseph Maclay were not heard as witnesses although Major Laing was alleged to have been subpoenaed by the Ministry of Shipping. Before the case was heard in the Court of Admiralty, Major Laing had indicated to Mr. Ambatielos that these letters were in existence. He did not, however, transmit copies of the correspondence to Ambatielos before the trial.

Ambatielos appealed against the judgment of Mr. Justice Hill and asked the Court of Appeal for leave to call Major Laing as a witness. This, however, was refused by the Court of Appeal, the Court holding that it was against precedent to allow a party to call a witness in the Court of Appeal when that party could have called the witness in the Court of first instance. After the Court of Appeal had given its judgment in 1923,[2] Ambatielos did not proceed with his general appeal, nor did he try to obtain a reversal of the decision of the Court of Appeal by appealing further to the House of Lords. When, later that year, the Crown brought another claim against Ambatielos for an account and possession of the *Keramies*, the defendant did not appear, nor was he represented by counsel. The case, which was heard on July 20, 1923, was in all respects similar to the case previously before Mr. Justice Hill. The judgment of July 1923 was not appealed against by Ambatielos. Thus the proceedings before the United Kingdom courts came to an end. They were followed by diplomatic exchanges between the Greek and United Kingdom Governments between 1925 and 1940.

In 1951, the case was brought before the International Court of Justice which, on July 1, 1952,[3] found by thirteen votes to two "that it is without jurisdiction to decide on the merits of the

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[1] *Ambatielos* v. *Board of Trade*, (1923) 14 Ll.Rep., p. 4.

[2] See 14 Ll.Rep. 300, 387.

[3] *Ambatielos Case* (*Greece* v. *United Kingdom*), *Preliminary Objection*: *I.C.J. Reports*, 1952, p. 28; *International Law Reports*, 1952, Case No. 96.

Ambatielos claim " and, by ten votes to five, " that it has jurisdiction to decide whether the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926,[1] the difference as to the validity of the Ambatielos claim, in so far as this claim is based on the Treaty [of Commerce and Navigation between Greece and Great Britain, signed in Athens on November 10, 1886] . . ."

In 1952, the case again came before the International Court of Justice, which, on May 19, 1953, held by ten votes to four " that the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity, under the Treaty of 1886, of the Ambatielos claim."[2]

On February 24, 1955, the two Governments accordingly concluded an Agreement regarding the Submission to Arbitration of the Ambatielos Claim. Under Article 2 of this Agreement the present Commission of Arbitration was requested to determine:

> " (a) the validity of the Ambatielos claim under the [Treaty of 1886] having regard to:
>
> (i) the question raised by the United Kingdom Government of undue delay in the presentation of the claim on the basis of the Treaty;
>
> (ii) the question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty;
>
> (iii) the provisions of the Treaty;
>
> " (b) in the event of the Commission holding that the claim is valid, whether the United Kingdom Government ought now in all the circumstances to pay compensation to the Royal Hellenic Government; and if so, the amount of such compensation."

With regard to (a) (i) and (ii), the United Kingdom had during the proceedings before the International Court of Justice submitted

> " 6. That if . . . the Ambatielos claim be held to be based on the Treaty of 1886, the United Kingdom Government is not obliged to submit to arbitration the difference as to the validity of the claim for one or other or all of the following reasons:

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[1] *I.e.*, the Declaration Accompanying the Treaty of Commerce and Navigation between Great Britain and Greece of July 16, 1926, *viz.*: " It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the protocol of November 10th, 1886, annexed to the said Treaty " (*Award*, Annex 6).

[2] *Ambatielos Case* (*Greece* v. *United Kingdom*), *Obligation to Arbitrate*: *I.C.J. Reports*, 1953, p. 10; *International Law Reports*, 1953, p. 547.

(*a*) non-exhaustion of local remedies;
(*b*) undue delay in preferring the claim on its present alleged basis;
(*c*) undue delay and abuse of the process of the Court in that, although reference of the dispute to the compulsory jurisdiction of the Court has been continuously possible since the 10th December, 1926, no such reference took place until the 9th April, 1951."

and with regard to (iii)

"4. That the Ambatielos claim is not a claim based on the Treaty of 1886, unless it is a claim the substantive foundation of which lies in the Treaty of 1886.

"5. That, having regard to (4) above, the Ambatielos claim is not a claim the substantive foundation of which lies in the Treaty of 1886, for one or other or all of the following reasons:

(*a*) the Ambatielos claim does not come within the scope of the Treaty;
(*b*) even if all the facts alleged by the Hellenic Government were true, no violation of the Treaty would have occurred;
(*c*) local remedies were not exhausted;
(*d*) the Ambatielos claim—in so far as it has any validity at all, which the United Kingdom Government denies—is based on the general principles of international law and these principles are not incorporated in the Treaty of 1886."

In the present proceedings the Greek Government on these points submitted:

"(i) With regard to the question of undue delay raised by the United Kingdom Government in the presentation of the Ambatielos claim, the facts are that the first Note of the Greek Government asking the United Kingdom Government 'to cause a careful examination of the case' was presented to the British Foreign Office in September, 1925 viz., approximately two-and-a-half years from the date of the judgment of the English Court of Appeal, and from 1933 onwards (apart from the war period) continuous requests for international arbitration were being made to the United Kingdom Government by the Greek Government. These requests were met by stubborn refusals to negotiate in any way whatever;

"(ii) On the question raised by the United Kingdom Government of non-exhaustion of the legal remedies by Mr. Ambatielos in the English Courts, there are two points, namely: (*a*) failure to appeal to the House of Lords against the refusal of the Court of Appeal to admit fresh evidence on appeal from the judgment of the English Court of Admiralty and (*b*) failure to prosecute an appeal from the said judgment;

" As to (*a*), the short answer is that in refusing Mr. Ambatielos' request for the production of fresh evidence, the Court of Appeal was exercising its discretion in a matter of practice and procedure and that an appeal to the House of Lords had no prospects of success.

" As to (*b*), in the absence of the fresh evidence referred to in (*a*), the prospect of success on appeal was so slight as to be ' ineffective ' within the meaning of international law;

" (iii) On the question of the validity of the Ambatielos claim under the provisions of the Treaty, the Greek Government contends that its national did not receive at the hands of the United Kingdom the treatment to which Greek nationals are entitled under the provisions of the Treaty and generally under the rules of international law, justice, right, and equity applicable thereto. As argued by Sir Frank Soskice before the International Court of Justice in March, 1953:—' The plain, unvarnished truth here is that the Greek Government complain of the fact that one of their nationals paid £1,600,000 for nine ships, got no ships, got nothing for his money: £500,000 of that £1,600,000 was specifically paid in order to ensure that the ships should be delivered at a certain time; they were not delivered at that time; the British executive authorities then kept back evidence which prevented Mr. Ambatielos getting relief from the British Courts. He got no relief but was ordered to pay some £350,000 instead.' "

The principal contentions of the parties were:

1. The Greek Government contended that the expression " within the time agreed " in para. 7 of the contract of July 17, 1919, indicated that definite delivery dates had been fixed; the United Kingdom Government contended that the contract was complete without any reference to special delivery dates and denied on various grounds that any delivery date had been agreed upon.

2. The Greek Government contended that the expression above quoted referred to the buff slip of paper (produced from the Ministry's records) which bore the fixed dates agreed upon as part of the contract; the United Kingdom Government, that the dates on the buff slip of paper were merely indications of the time when the ships could be expected to be ready for delivery.

3. The Greek Government relied upon a telegram sent on October 31, 1919, in the name of Sir John Esplen, who was Major Laing's

superior in the Ministry of Shipping, to the Far Eastern representative of the Ministry, and which was in the following terms:

> "From Esplen Shipminder, London—To Britannia, Hong Kong. Following for Dodwell, War Trooper. As the steamer was sold to buyers for delivery not later than November it is of the utmost importance that she should be completed by that date stop Cable immediately progress of construction (Signed) M. J. Straker."

The existence of this telegram was not in dispute between the parties, but the parties were not agreed as to the circumstances in which it was sent.

4. The Greek Government contended—quoting in support of their contention a statutory declaration by Major Laing, sworn in 1934—that Major Laing had induced Ambatielos to pay a half million pounds more than the price then ruling for vessels of the same type because he, Major Laing, had been able to give fixed dates. The United Kingdom Government contended that the prices were not unduly high for ships of that kind and that the price could certainly be accounted for by the privilege granted to Ambatielos for "free charter-parties" not subject to the regulations of the United Kingdom Government, by Ambatielos's being able to sail the ships under the Greek flag and by the favourable freight rates he would be able to obtain, the ships being stationed in the Far East where freight rates were very high.

5. The Greek Government contended that the refusal of the United Kingdom Government to produce inter-departmental minutes was an unwarranted abuse of Crown Privilege.

6. The Greek Government also contended that the non-production in court of the letters exchanged between Sir Joseph Maclay and Major Laing was an abuse of right which amounted to a denial of justice; the United Kingdom Government asserted that the correspondence was exempt from production in accordance with the English law of procedure, which exempts from production any document prepared for the purpose of the proceedings.

Other contentions appear from the *Held*, below.

The Greek claim was put as follows:

I. *Financial.*—"The main claim A., consisting of £8,059,488 11s. 0d., as compensation for breach of the contract of sale, an alternative claim B. based on unjust enrichment amounting to £4,140,075, and another alternative claim C. in connection with the cancelling date of the purchase of the *Mellon* and the *Stathis* amounting to £4,409,242."[1]

II. *Argument.*—"*A. Under the claim based on Article X* of the Anglo-Greek Treaty of Commerce and Navigation, 1886, read in conjunction with Article 16 of the Treaty of Peace and Commerce between Great Britain and Denmark of 1660 (1661); Article 24 of the like Treaty of 1670; Article III of the Anglo-Spanish Treaty of 1667; Article 6 of the Treaty of Peace and Commerce between Great Britain and Sweden, 1661; Article 7 of the Anglo-Peruvian Treaty, 1830; Article I of the Anglo-Japanese Treaty, 1911; and Article X of the Anglo-Bolivian Treaty, 1911. . . .

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[1] The Greek Government claimed that it was wrong to cancel the contract as from the date of judgment, instead of cancelling it as from November 4, 1920, when the mortgage deeds were signed.

" *B. Under the claim based on Article XV* of the Anglo-Greek Treaty of Commerce and Navigation, 1886.

" 1. The British Government put forward a case before Mr. Justice Hill contrary to documents in their possession.

" 2. The British Government withheld those documents, thereby preventing Mr. Ambatielos knowing that they were putting forward a case of that kind, namely, a case known to be false.

" 3. The British Government did so in circumstances in which they knew that Mr. Ambatielos had no power to compel them to disclose those documents, they having the right to refuse to disclose them."

The final submissions of the United Kingdom were as follows: " In the light of the facts, considerations and contentions set out in the present Counter-Case, the United Kingdom Government asks the Commission to adjudge and declare the Greek Claim to be invalid, because

" (1) there has been undue delay in presenting the claim on the basis of the 1886 Treaty;
" (2) the Claimant failed to exhaust his legal remedies in the English Courts;
" (3) the Claim discloses no breach of the 1886 Treaty, direct or indirect."

Held: (i) *As to the objection of undue delay:* The delay on the part of the Greek Government was not such as to cause its claim to be rejected; the delay was irrelevant to the question of prescription, although it might have a bearing on that of evidence.

(ii) *As to the interpretation of Article X* (the most-favoured-nation clause) of the Treaty of 1886: Such a clause could only attract matters belonging to the same category of subjects as that to which the clause itself related. However, in the context of the Treaty, " the administration of justice " was not a subject matter other than " commerce and navigation ". On the other hand, the clause could not be said to incorporate the principles of international law in the Treaty of 1886. The object of the Treaty was not to guarantee to the nationals of the contracting States the principles of international law; it was to provide for the exercise of diplomatic protection. Nor did the most-favoured-nation clause, by reference to certain Treaties concluded in the seventeenth century by the United Kingdom with Scandinavian States, give the Greek Government the right to claim for Ambatielos treatment in accordance with " justice ", " right " and " equity " in the abstract and independently of the rules of English law. In particular, Article X did not give any remedy based on " unjust enrichment " beyond what the law of England provided.

(iii) *As to the application of Article X* of the Treaty of 1886 in the present dispute: The Article had no bearing on the dispute. The provisions contained in other Treaties relied on by the Greek Government did not provide for any " privileges, favours or immunities " beyond those resulting from a subsequent Article—Article XV—of the Treaty of 1886.

(iv) *As to the interpretation of the expression " free access to the [English] Courts "* contained in Article XV of the Treaty: This meant non-discrimination against foreigners who resorted to the Courts. The facts alleged against the United Kingdom Government in the present case did not amount to depriving Ambatielos of the right of free access to the courts afforded to him by Article XV of the Treaty.

(v) *On the question of non-exhaustion of local remedies,* relied on by the United Kingdom Government: Ambatielos had failed to exhaust his remedies by (a) not calling Major Laing as witness before the High Court, (b) not prosecuting his appeal to the Court of Appeal, (c) not suing for the return of the sum mentioned as " unjust enrichment " in claim B., and (d) not suing for the sum mentioned as damages for not cancelling the sale of two ships in claim C.

The Commission said: " The Commission will begin the determination of the issues submitted to it by examining the question raised by the United Kingdom Government of undue delay in the presentation of the claim on the basis of the 1886 Treaty.

" The Commission thinks it desirable thereafter to determine the question of the validity of the Ambatielos claim under the 1886 Treaty. Finally, the Commission will determine the question whether the legal remedies in the English Courts were exhausted by Mr. Ambatielos.

" *The question of undue delay in the presentation of the Claim on the basis of the Treaty of* 1886.—The Government of the United Kingdom contends that the claim of the Greek Government ought to be rejected by reason of the delay in its presentation.

" It is generally admitted that the principle of extinctive prescription applies to the right to bring an action before an international tribunal. International tribunals have so held in numerous cases (Oppenheim-Lauterpacht—*International Law*, 7th Edition, I, paragraph 155c; Ralston—*The Law and Procedure of International Tribunals*, paragraphs 683–698, and *Supplement*, paragraphs 683 (a) and 687 (*a*)). *L'Institut de Droit international* expressed a view to this effect at its session at The Hague in 1925.

" There is no doubt that there is no rule of international law which lays down a time limit with regard to prescription, except in the case of special agreements to that effect, and accordingly, as *L'Institut de Droit international* pointed out in its 1925 Resolutions, the determination of this question is ' left to the unfettered discretion of the international tribunal which, if it is to accept any argument based on lapse of time, must be able to detect in the facts of the case before it the existence of one of the grounds which are indispensable to cause prescription to operate '.

" The Commission does not find in the circumstances of the present case any reason which would justify the application of the principle of prescription to the claim of the Greek Government.

" The diplomatic correspondence produced by the Parties shows that the Greek Government intervened from 1925 onwards in order to exercise its diplomatic protection on behalf of Mr. Ambatielos, and that, since then, it has made repeated representations at intervals which cannot be regarded as abnormal in the particular circumstances of the case.

" It should also be noted that the Government of the United Kingdom has not, before the Commission, persisted in the argument which it put forward before the International Court of Justice in support of its allegation of ' undue delay '. Before the International Court the Government of the United Kingdom contended that the Greek Government had been dilatory in taking up the Ambatielos Claim initially, and in prosecuting it generally. Before the Commission it abandoned this complaint. (United Kingdom Counter-Case, paragraphs 168 and 169).

" In the arguments addressed to the Commission, the undue delay imputed to the Greek Government did not relate to the diplomatic representations made and pursued by that Government, but to the use the latter made of the Treaty of 1886 as being the basis of its action.

" It is a fact that until 1939 the claim of the Greek Government seemed to be based solely on general international law, and that it was in the Note of 21st November, 1939, addressed by the Greek Legation in London to the Secretary of State for Foreign Affairs of the United Kingdom (International Court of Justice, *Ambatielos Case*, Pleadings pp. 96–98) that the Treaty of 1886 was for the first time relied upon to support the claim.

" The Government of the United Kingdom explains this change of attitude as being due to the anxiety of the Greek Government to submit the dispute to arbitration. So long as the dispute remained within the sphere of general international law, there was no obligation on the United Kingdom to submit to arbitration or judicial settlement. On the other hand, by linking the dispute with the Treaty of 1886, the Greek Government could, by virtue of the Declaration which the two Governments had signed on 16th July, 1926, rely upon the obligation provided for in this Declaration, to the effect that ' claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886 ' were to be submitted to arbitration.

" This explanation is a plausible one, but it is difficult to see what effect it can have on prescription.

" The Greek Government, by changing the legal basis of its action in order to obtain a settlement of the dispute by arbitration, only exercised the right to which it was entitled. If it did not adopt this attitude until 1939 when its initial diplomatic intervention dates back to 1925, that fact cannot be held against it in so far as concerns the operation of prescription, unless it brought about results which, *in themselves*, would justify the operation of prescription—such, for instance, as the difficulties of the United Kingdom in assembling the elements of proof requisite for or useful to its defence.

" Furthermore, it is not very clear from the United Kingdom Counter-Case whether the allegation against the Greek Government is directed to that Government's having waited until 1939 to decide upon the present legal basis for its action, or whether it is not rather directed to the Greek Government's having waited until 1951 to institute the legal proceedings which it was open to it to ' institute, compulsorily, as early as, at the latest, 1926 '. (Counter-Case, paragraph 168.)

" In the latter case the alleged delay would be concerned not with the fact that reliance was placed on the Treaty of 1886, but that *legal action* was taken on the basis of that Treaty.

" The Government of the United Kingdom desires it to be understood that if the Greek Government had acted earlier, the evaluation and appreciation of the events in dispute would have been simpler and more certain. (Counter-Case, paragraph 169). This contention, however, does not find support in any specific fact, and it would seem to be all the more difficult to accept because—even though *the legal basis* of the claim has been changed during the diplomatic exchanges—*the facts* which constitute its substance have remained the same from the beginning, and from the point of view of difficulty of proof these facts are, above all, important.

" The Commission is therefore of opinion that the objection of ' undue delay ' raised by the Government of the United Kingdom is not well-founded, in so far as it is intended to cause the claim of the Greek Government to be rejected.

" But the Government of the United Kingdom would appear to draw a further conclusion from the delay which it imputes to the Greek Government. It contends, in fact, that as the Greek Government invoked the Treaty of 1886 as the basis of its claim only belatedly, there would, for this reason, be a presumption unfavourable to its case. (Counter-Case, paragraphs 175 and 176).

" This consideration, however, is irrelevant to prescription, and could have a bearing only on the requirements of proof.

" *The Validity of the Ambatielos Claim under the* 1886 *Treaty.*— As stated in the Greek Case (paragraph 6, iii) ' the Greek Government contends that its national (Mr. Ambatielos) did not receive at the hands of the United Kingdom Government the treatment to which Greek nationals are entitled under the provisions of the Treaty, and generally under the rules of international law, justice, right and equity applicable thereto.'

" Further on, the part of the Case dealing specifically with the question of ' the validity of the Ambatielos claim under the provisions of the 1886 Treaty ' (paragraph 58), reads as follows : ' The Greek Government contends that there has been a breach by the United Kingdom *of all or any of the following provisions* of the Anglo-Greek Treaty of Commerce and Navigation of November 10, 1886, to wit : '. Articles I, X, XII and XV of the Treaty are then quoted in full in paragraphs 58, 59, 78 and 80 of the Case, respectively, and comments are made on each of the aforesaid provisions, in support of the Greek contention, in paragraphs 58 to 90 of the Case.

" The position of the Greek Government as outlined above and as it presented itself when the oral hearing began, was subsequently changed. The Commission requested Counsel for the Greek Government at the end of the 6th meeting, held on 1st February, to indicate at the conclusion of their arguments *and in a precise manner:*

" (1) the facts which in the opinion of that Government resulted in the international responsibility of the British Government;

" (2) the Article or Articles of the Treaty of 1886 to which each of these facts, according to the Greek Government, was referable.

" In accordance with this request, Sir Frank Soskice, Chief Counsel for the Greek Government, at the 8th meeting of the Commission, held on 3rd February, made the following statement:

> ' I accept that in order to succeed in this claim the Greek Government must be able to establish that there was a breach of some provision, some Article of the 1886 Anglo-Greek Treaty. The only Articles which, in the submission of the Greek Government, were breached, were Article X and Article XV . . . It is not asserted any longer that there was a breach of Article I.'

" After this statement Sir Frank Soskice set out the facts and claims which have been enumerated above.

" In paragraph 12 of those submissions Chief Counsel for the Greek Government, Sir Frank Soskice, stated:

> ' The totality of the facts above set out or of such of them as the Commission may find to have been established . . . the Greek Government contends . . . constitute a breach of Article X of the 1886 Treaty.'

Furthermore, Counsel for the Greek Government at the 6th meeting withdrew the contents of paragraphs 70, 71 and 74 of the Greek

Case; and at the 8th meeting the previous allegation in respect of a breach of Article XII of the Treaty of 1886 was also withdrawn.

"These paragraphs and a Statement made on their withdrawal are set out in Annex 8[1] to this award.

"Furthermore, Counsel for the Greek Government asserted that Article XV of the above-mentioned Treaty had been violated in the manner specified in the three particulars set out at the very end of the final submissions, and which will be the subject of consideration in connection with Article XV.

"On the other hand, the Government of the United Kingdom, in paragraph 178 of the Counter-Case, maintains that 'no breach of the Treaty could be established, even if the Greek version of the facts were accepted as correct'.

"It is apparent, therefore, that the essential task of the Commission is to determine, in the light of such facts as it may consider duly established by the Claimant Government on whom the burden of proof obviously lies whether or not Articles X and XV of the Treaty of 1886, or either of them, have been violated by the Government of the United Kingdom.

"*The Interpretation of Article X of the Treaty of* 1886.—Article X of the Treaty of 10th November, 1886, reads as follows:

> 'The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most-favoured-nation.'

The Greek Government claims that by virtue of the most-favoured-nation clause contained in this Article, it is entitled to claim for its nationals treatment in accordance with 'justice', 'right', 'equity' and the 'principles of international law', such treatment having been assured by the United Kingdom to the nationals of other States, by virtue of the Treaties concluded by that country with Denmark, Spain, Sweden, Peru, Costa Rica, Japan and Bolivia. (Greek Case, paragraphs 60–63, and International Court of Justice, *Ambatielos Case*, Pleadings, pp. 509–515.)

"The United Kingdom Government disputes that this is so. It puts forward the following:

"(*a*) that a most-favoured-nation clause can, in principle, only attract treatment accorded to other countries or their nationals as a *privilege, favour, or immunity*, and not treatment accorded as a right (irrespective of any conventional basis), such as treatment in accordance with the principles of international law;

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[1] [Not here reproduced.]

" (*b*) that a most-favoured-nation clause can only attract matters belonging to the same category of subject as the clause itself relates to;

" (*c*) that the most-favoured-nation clause in Article X of the 1886 Treaty only relates to commerce and navigation and not to the administration of justice;

" (*d*) that even were Article X of the 1886 Treaty so worded as to attract a right to treatment in accordance with the general rules of international law, justice, right and equity, relative to the administration of justice, no such right is in fact conferred by the provisions of the other Treaties cited by the Greek Government. (United Kingdom Counter-Case, paragraphs 237–249.)

" The Commission does not deem it necessary to express a view on the general question as to whether the most-favoured-nation clause can never have the effect of assuring to its beneficiaries treatment in accordance with the general rules of international law, because in the present case the effect of the clause is expressly limited to ' any privilege, favour or immunity which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State ', which would obviously not be the case if the sole object of those provisions were to guarantee to them treatment in accordance with the general rules of international law.

" On the other hand, the Commission holds that the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.

" The Commission is, however, of opinion that in the present case the application of this rule can lead to conclusions different from those put forward by the United Kingdom Government.

" In the Treaty of 1886 the field of application of the most-favoured-nation clause is defined as including ' all matters relating to commerce and navigation '. It would seem that this expression has not, in itself, a strictly defined meaning. The variety of provisions contained in Treaties of commerce and navigation proves that, in practice, the meaning given to it is fairly flexible. For example, it should be noted that most of these Treaties contain provisions concerning the administration of justice. That is the case, in particular, in the Treaty of 1886 itself, Article XV, paragraph 3 of which guarantees to the subjects of the two Contracting Parties ' free access to the Courts of Justice for the prosecution and defence of their rights '. That is also the case as regards the other Treaties referred to by the Greek Government in connection with the application of the most-favoured-nation clause.

" It is true that ' the administration of justice ', when viewed in isolation, is a subject-matter other than ' commerce and navigation ', but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

" Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes ' all matters relating to commerce and navigation '. The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.

" Although the wording of Article X does not provide a clear and decisive indication in this respect, the Commission is of opinion that it is difficult to reconcile the narrow interpretation submitted by the Government of the United Kingdom with the indications given in the text, in particular in the last part of the sentence: ' it being their (the Contracting Parties') intention that the trade and navigation of each country shall be placed, *in all respects*, by the other on the footing of the most-favoured-nation '.

" Having thus determined the meaning of the most-favoured-nation clause contained in Article X of the Treaty of 1886, the next question is whether this clause effectively brings about the results which the Greek Government believes it does, by relying on the various Treaties concluded by the United Kingdom with other States.

" One of these results, it is contended, would be to incorporate in the Treaty of 1886 the ' principles of international law '. To justify this argument, the Greek Government relies exclusively on Article 10 of the Treaty of Commerce concluded on 1st August, 1911, between the United Kingdom and Bolivia, which reads as follows:

> ' The High Contracting Parties agree that during the period of existence of this treaty they mutually abstain from diplomatic intervention in cases of claims or complaints on the part of private individuals affecting civil or criminal matters in respect of which legal remedies are provided.
>
> ' They reserve, however, the right to exercise such intervention in any case in which there may be evidence of delay in legal or judicial proceedings, denial of justice, failure to give effect to a sentence obtained in his favour by one of their nationals or violation of the principles of international law.' (International Court of Justice, *Ambatielos Case*, Pleadings, p. 515).

" The Commission cannot agree that a provision such as this has the effect of incorporating the principles of international law in the Anglo-Greek Treaty of 1886 by virtue of the most-favoured-nation clause.

" As stated above, the most-favoured-nation clause contained in the Treaty of 1886 applies only to privileges, favours and immunities granted to other countries, and therefore cannot incorporate the principles of international law in the said Treaty. If need be, this observation would suffice to reject the conclusion which the

Greek Government considers itself entitled to draw from Article 10 of the Anglo-Bolivian Treaty. There is another decisive reason, however, which corroborates the preceding one: It is the fact that it is in no way the object of this provision to guarantee to the nationals of the Contracting State the principles of international law. Its object is to provide in a special manner, as between Contracting States, for the exercise of diplomatic protection. According to the first paragraph of the Article the Contracting Parties undertake to abstain from any intervention of this kind in respect of claims by private individuals for which local remedies are provided. The second paragraph provides for certain exceptions to this rule, one of which reserves the right to exercise such intervention in case of violation of the principles of international law. It is with regard to this exception that the Article refers to the principles of international law. However, it refers to these principles solely for the purpose of laying down the *condition* which governs this exception, and not for the purpose of guaranteeing the benefit of these principles to the nationals of the Contracting States.

" Whichever way the matter is envisaged, it is impossible to accept the proposition that Article 10 of the Anglo-Bolivian Treaty has the effect, by virtue of the most-favoured-nation clause, of incorporating the principles of international law in the Treaty of 1886.

" The provisions of other treaties on which the Greek Government relies are concerned with the *administration of justice*. Several of them date back to the seventeenth century (the Treaties of 13th February, 1660–1661, and of 11th July, 1670, with Denmark; a Treaty of 23rd May, 1667, with Spain; Treaties of 11th April, 1654, and of 21st October, 1661, with Sweden). Naturally, their wording was influenced by the customs of the period, and they must obviously be interpreted in the light of this fact. It is only in these Treaties of the seventeenth century that certain references appear to ' justice ', ' right ' and 'equity ' on which the Greek Government relies in support of its claim that these concepts have been incorporated as such in the Anglo-Greek Treaty of 1886.

" The Commission takes the view that to attribute such significance to these provisions would be to strain their meaning. ' Justice ', ' right ' and ' equity ' are not guaranteed by these provisions as rights independent of and superior to positive law, but simply within the framework of the municipal law of the Contracting States. It was not an ideal system of ' justice ', ' right ' and ' equity ' which the signatory Governments intended to assure to their respective nationals; it was the application of their national laws concerning the administration of justice.

" Furthermore, the Treaties concluded with Denmark provide an indication in this respect which leaves no room for doubt: Article 46 of the Treaty of 1660–1661 specifies, ' *according to the laws and* *statutes of each country* ', and Article 24 of the Treaty of 1670, ' *according to the laws and statutes of either country* '.

" The same idea is expressed in different fashion in the Treaty of 1667 with Spain: ' until such time as Justice is sought and followed *in the ordinary course of Law* '; ' to the end that all such differences be compounded in friendship, or *according to Law* '.

" It is true that the Treaties of 1654 and 1661 with Sweden do not expressly mention municipal law, but there is nothing which permits us to ascribe a different meaning to them. The provision that ' in case the people and subjects on either part . . . shall stand in need of the Magistrate's help, the same shall be readily and according to the equity of their cause in friendly manner granted to them and justice shall be administered to them without long . . . delays ' must refer to help and equity and justice according to municipal law. Moreover, these Treaties were contemporary with those concluded with Denmark and Spain, to which reference has just been made, and it is difficult to believe that, notwithstanding some discrepancies in wording, the intention of the Contracting Parties was not the same in each case.

" The Commission cannot, therefore, accept the argument that the Treaties concluded by the United Kingdom in the seventeenth century with Denmark, Spain and Sweden give the Greek Government the right to claim for Mr. Ambatielos treatment in accordance with ' justice ', ' right ' and ' equity ' in the ideal sense of those words and independently of the rules of English law.

" As for the Treaties which were concluded after the seventeenth century and to which reference is made by the Greek Government, they obviously cannot be relied upon to support this argument because they are limited to guaranteeing equality of treatment with the signatories' own nationals in the matter of the administration of justice.

" To sum up, the Commission is of opinion:

" (1) that the Treaty concluded on 1st August, 1911, by the United Kingdom with Bolivia cannot have the effect of incorporating in the Anglo-Greek Treaty of 1886 the ' principles of international law ', by the application of the most-favoured-nation clause;

" (2) that the effects of the most-favoured-nation clause contained in Article X of the said Treaty of 1886 can be extended to the system of the administration of justice in so far as concerns the protection by the courts of the rights of persons engaged in trade and navigation;

" (3) that none of the provisions concerning the administration of justice which are contained in the Treaties relied upon by the Greek Government can be interpreted as assuring to the beneficiaries of the most-favoured-nation clause a system of ' justice ', 'right' and 'equity' different from that for which the municipal law of the State concerned provides;

"(4) that the object of these provisions corresponds with that of Article XV of the Anglo-Greek Treaty of 1886, and that the only question which arises is, accordingly, whether they include more extensive 'privileges', 'favours' and 'immunities' than those resulting from the said Article XV;

"(5) that it follows from the decision summarised in (3) above that Article X of the Treaty does not give to its beneficiaries any remedy based on 'unjust enrichment' different from that for which the municipal law of the State provides.

"As will be shown below, the Commission is of opinion that 'free access to the Courts', which is vouchsafed to Greek nationals in the United Kingdom by Article XV of the Treaty of 1886 includes the right to use the Courts fully and to avail themselves of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.

"The Commission is therefore of opinion that the provisions contained in other Treaties relied upon by the Greek Government do not provide for any 'privileges, favours or immunities' more extensive than those resulting from the said Article XV, and that accordingly the most-favoured-nation clause contained in Article X has no bearing on the present dispute. In view of this decision as to the proper interpretation of Article X the Commission finds it unnecessary to consider expressly whether any of the 11 allegations of fact which, in their totality, are alleged to constitute a breach of Article X, have been established. Some of the allegations are however disposed of, when relevant, in other parts of this award.

"*The Interpretation of Article XV of the Treaty of* 1886.—The submissions relative to breaches of Article XV of the Anglo-Greek Treaty of 1886 will now be examined.

"Article XV provides as follows:

> 'The dwellings, manufactories, warehouses and shops of the subjects of each of the Contracting Parties in the dominions and possessions of the other, and all premises appertaining thereto destined for purposes of residence or commerce shall be respected.
>
> 'It shall not be allowable to proceed to make a search of, or a domiciliary visit to, such dwellings and premises, or to examine and inspect books, papers, or accounts, except under the conditions and with the form prescribed by the laws for subjects of the country.
>
> 'The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the

persons admitted to the exercise of those professions according to the laws of the country.'

" For the purposes of this arbitration the Commission is solely concerned with the third paragraph of this Article and its decision must necessarily hinge upon the interpretation to be given to the phrase ' free access to the [English] Courts of Justice ', which is used by the Parties to the Treaty.

" The Greek Government contends (paragraph 81, Greek Case), that ' access to the Courts for the prosecution and defence of their rights is not limited to allowing a foreign national to go to Court and plead his cause but includes the obligation to make it possible for him to avail himself of all the documents necessary for the defence of his rights. Construed in its natural meaning, the term does not apply only to a material access to the Court, but an access ensuring all rights of defence '.

" The United Kingdom Government, on the other hand, maintains (paragraph 223, United Kingdom Counter-Case) that ' even if the third paragraph of Article XV were given the extended meaning contended for by the Greek Government there would still be no breach of this provision because in fact the claimant had all the facilities necessary . . .'

" In the submission at the end of the oral proceedings referred to above, as formulated by Counsel for the Greek Government at the 8th meeting of the Commission, the following concrete facts were asserted as constituting violations of Article XV of the Treaty of 1886:

' 1. The British Government put forward a case before Mr. Justice Hill contrary to documents in their possession.

' 2. The British Government withheld those documents, thereby preventing Mr. Ambatielos *knowing* that they were putting forward a case of that kind, namely a case known to be false.

' 3. The British Government did so in circumstances in which they knew that Mr. Ambatielos had no power to compel them to disclose those documents, *they having the right to refuse to disclose them.*'

The submission therefore is that Mr. Ambatielos was denied ' access to the English Courts ' by reason of the three facts stated above. Before entering into a separate analysis of the charges implied in the three facts asserted by the Greek Government, the Commission deems it advisable to state its views on the meaning of the term ' free access ', as used in the Treaty of 1886.

" The modern concept of ' free access to the Courts ' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of ' free access ' is adherent to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights. Thus, when ' free access to the Courts ' is covenanted by a State in favour of the subjects or citizens of another State, the covenant is that the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.

" The Commission is of opinion that this is what was agreed upon in paragraph 3 of Article XV of the Anglo-Greek Treaty of 1886. This clause in effect provides, for the benefit of Greek subjects in the United Kingdom, that they ' shall have free access to the Courts of Justice for the prosecution and defence of their rights, *without other conditions, restrictions or taxes beyond those imposed on native subjects and shall be at liberty to employ, in all causes, their advocates, attorneys or agents . . .'*

" Therefore, there would be a breach of this clause in the present case if it could be proved that when an action was brought against Mr. Ambatielos by the Board of Trade he was prevented from exercising any procedural right or remedy; or that in some way he was not treated in accordance with English law and practice; or that he was not permitted to employ advocates, attorneys or agents; or that conditions, restrictions or taxes beyond those imposed on British subjects were imposed on him; or that he was in some other way denied access to the English Courts.

" In order to determine the existence or non-existence of the facts referred to above, the Commission will examine separately each of the charges preferred by the Greek Government against the United Kingdom Government in the submissions of the former at the end of the hearing. The first is that:

" ' *The British Government put forward a case before Mr. Justice Hill contrary to documents in their possession.'*

" In the first place the Commission must determine what is meant by the phrase *a case contrary to documents in the possession* of the United Kingdom Government. The ' case ', of course, is the ' case ' put forward by the Board of Trade in a series of actions tried before Mr. Justice Hill in November, 1922, in the Admiralty Division of the High Court of Justice. In this arbitration these actions are generally referred to as ' the proceedings before Mr. Justice Hill '. These proceedings were brought by the Board of Trade, as successors to the Shipping Controller as Mortgagees under mortgages dated 4th November, 1920, and placed on seven ships purchased by Mr. Nicholas E. Ambatielos, to secure the payment of moneys due on the purchase price. The Board of Trade claimed possession of the ships under the mortgage deeds and under the terms of a certain Indenture or Deed of Covenant executed on the same date.

" The action was resisted by the Defendant on several gounds, the principal ground being that the Shipping Controller had agreed to deliver the ships which had been sold, on certain fixed dates, that the ships had not been delivered on these dates and that by reason of the delay the Defendant had suffered damage. The Defence in the *Cephalonia* case (Annex 1A, United Kingdom Counter-Case) alleges the following:

' 4. In addition to the written terms embodied in the said contract, it was verbally agreed at or about the time at which the said contract was entered into, that the said steamships should be delivered to the Defendant on dates certain. The said verbal agreement was made between Major Bryan Laing on behalf of the Shipping Controller and Mr. G. E. Ambatielos on behalf of the Defendant. The said verbal term of the contract was subsequently confirmed in writing by letters of the 2nd May, 1921, from the Defendant to the said Major Bryan Laing and of the 11th May, 1921, from the said Major Laing to the Defendant.'

" The essence of the controversy which has led to this arbitration—as the arguments, both written and oral, fully show—is whether the United Kingdom Government, represented by the Shipping Controller, agreed with Mr. Ambatielos to deliver on dates certain the ships which had been sold to him, and the basis of the claim for damages is that the contract was broken by a failure to deliver the ships on the dates alleged to have been agreed upon. The Commission, therefore, must assume that by documents contrary to the claim which was put forward by the United Kingdom Government the Greek Government means documents which show that fixed dates were agreed upon between the Government and Mr. Ambatielos for the delivery of the ships.

" In the opinion of the Commission it cannot be contended successfully that documents known to the advisers of Mr. Ambatielos at the time of the proceedings in 1922 and produced to Mr. Justice Hill were sufficient in themselves to show so clearly that fixed dates were agreed upon as to establish that the United Kingdom Government was putting forward a case contrary to documents in its possession.

" According to the evidence before the Commission, the documents in the possession of the United Kingdom Government at the time when the action was before Mr. Justice Hill (*apart from those which were shown to the advisers of Mr. Ambatielos or produced before Mr. Justice Hill*) must be divided into two categories, namely:

" (*a*) Documents, the existence of which is assumed, but the contents of which are unknown to the Commission such as the minutes, jackets, interdepartmental communications, files, etc., which are supposed to have been produced in or received by the Ministry of Shipping in connection with the purchase of the ships by Mr. Ambatielos or in connection with his subsequent claim; and

" (*b*) Documents which were in existence when the trial of 1922 was proceeding and which were made known subsequently and are contained in the Exhibits or Annexes filed with the Greek Case and the United Kingdom Counter-Case.

" With regard to documents in the first category, it is obvious that they do not constitute evidence on which the Commission can base a decision, inasmuch as they are not specified or identified and inasmuch as their contents are purely hypothetical. The Greek Government assumes that these unknown documents contain evidence of its main allegation that fixed dates for the delivery of the ships were agreed upon between the Ministry of Shipping and Mr. Ambatielos. As stated above, however, this Commission cannot possibly determine whether or not documents the contents of which are unknown are contrary to proceedings instituted on the basis of documents that are known. In other words, the Commission is unable to reach the conclusion that documents which it has not seen are contrary to the case put forward by the United Kingdom Government against Mr. Ambatielos.

" With regard to documents belonging to the second category, it is necessary to examine their contents and determine whether the United Kingdom Government and its legal advisers must have realised that in fact they were contrary to the case put forward by the United Kingdom Government, i.e., whether they were documents showing clearly that that Government, represented by the Shipping Controller, did in fact agree with Mr. Ambatielos to deliver on dates certain the ships which it had sold to him.

" The Commission does not find among the documents in the second category and reproduced in the Exhibits and Annexes filed by the Parties to this arbitration any document of a date prior to 24th November, 1922, which would furnish positive evidence that the United Kingdom Government entered into a binding agreement which provided for fixed delivery dates. Only such evidence would enable the Commission to hold that the United Kingdom Government or its advisers put forward a case which they knew to be contrary to documents in their possession.

" The contract of sale of 17th July, 1919, does not, in any of its clauses, expressly provide for fixed dates. Article 7 thereof refers to delivery '*within the time agreed*'. Article 3 stipulates that 'the steamers shall be deemed ready for delivery immediately after they have been accepted by the Vendor from the Contractors.' Finally, article 9 contemplates the case of default in delivery as between the Contractors (i.e. the builders of the ships) and the Vendor (i.e. the Shipping Controller).

" The phrase '*within the time agreed*' in article 7 of the contract leads to the inference that a time certain was agreed upon somewhere, in some manner, by the Contracting Parties. The Commission, however, does not find in the evidence before it any document distinct from the written contract which contains proof of the verbal agreement said to have been made with regard to fixed delivery dates, and which would thus prove that the United Kingdom Government put forward a case contrary to documents in its possession. As the pleadings of Mr. Ambatielos in the proceedings before Mr. Justice Hill, paragraph 4 of which is set out above, show, his defence was that in addition to the written terms of the contract, ' it was verbally agreed . . . that the said steamships should be delivered to the Defendant on dates certain,' and that ' the said verbal agreement was made between Major Bryan Laing on behalf of the Shipping Controller and Mr. G. E. Ambatielos on behalf of the Defendant.' It was further alleged in the Defence that ' the said verbal agreement was subsequently confirmed in writing by letters of the 2nd May, 1921, from the Defendant to the said Major Laing and of the 11th May, 1921 from the said Major Laing to the Defendant.' These letters read as follows:

" '*2nd May*, 1921.

" ' Dear Major Laing,

You may remember calling on me in Paris about the end of August 1919 regarding the purchase of nine boats, negotiated by my brother from the Ministry of Shipping. In the course of conversation we had, I remember emphasizing to you that I attached the utmost importance to the dates of delivery which you had given to my brother and which appear in my letter to him of the 3rd July, and those dates you assured me you were satisfied could be relied upon.

You explained to me that I was justified in paying the apparently high figure I had paid because you were selling and I was buying the then position, deliveries and freights in connection with the steamers rather than the steamers alone.

I should be much obliged if you would let me know whether your recollection of our interview coincides with mine.

Yours very truly,
(Signed) N. E. AMBATIELOS ' "

" ' 73, St. James Street,
London, S.W.
11th May, 1921.

" ' Dear Mr. Ambatielos,

I am in receipt of your letter of the 2nd May. I understand you have been away for some little time, otherwise I would have replied earlier.

I have read your letter through very carefully and so far as I can recollect your letter states what took place at the interview to which you refer.

Yours faithfully,
(Signed) Bryan Laing

Nicolas Ambatielos, Esq.,
18, Cavendish Square, London, W.' "

" The Commission is of opinion that these two letters fail to constitute evidence confirming the alleged verbal agreement, inasmuch as the statement made by Mr. Ambatielos was: ' . . . those dates you assured me *could be relied upon.*' And Major Laing in his reply agreed to the statement, saying: ' so far as I can recollect '. The language of the two letters expresses an *expectation*, not an agreement.

" The principal document, the contents of which are known to the Commission and which was in the possession of the Government at the time when the proceedings were before Mr. Justice Hill, and which dealt with the question of fixed delivery dates and which was not disclosed to the advisers of Mr. Ambatielos or produced to Mr. Justice Hill, was the letter addressed by Major Laing to Sir Joseph Maclay, the former Shipping Controller, on 20th July, 1922.

" This letter was written in reply to one in which Sir Joseph Maclay had asked Major Laing for information concerning the sale to Mr. Ambatielos, and Sir Joseph wrote in this connection:

" ' At the time the sale was being negotiated you will remember you were in constant touch with me, but so far as I remember, nothing was ever said about guaranteeing dates of delivery, which, of course, it was impossible to do. I presume you told purchaser that the Ministry would do anything it could to hasten delivery and hoped-for dates might be mentioned, but nothing beyond this.'

" The pertinent paragraphs of the answer by Major Laing were the following:

" ' I was of the opinion that it was most essential to dispose of the ships building at Hong Kong, and I had cables sent to our agents who were responsible for the building and completion, and they cabled back dates which they considered quite safe, and it was on this information that I was enabled to put forward a proposition to you.

' The Eastern freight market at that time being very high, I came to the conclusion, and laid my deduction before yourself and the Committee of the Ministry of Shipping, that, provided these ships could be delivered at the times stated by our agents on behalf of the builders, they were worth, with their position, owing to the freight they could earn, another £500,000, and this I added to what I considered an outside price for the ships. *It was only by this argument that I INDUCED Mr. Ambatielos to purchase the ships.*'

" It will be seen that this letter was not sufficiently concrete and to the point to constitute evidence strong enough to convince the

United Kingdom Government and its advisers of the fact that a legally binding agreement obliging the Government to adhere to fixed delivery dates was concluded by Major Laing, on behalf of the Government, with Mr. Ambatielos. It is worthy of note that Major Laing in his letter does not refer to an *agreement* with Mr. Ambatielos or even to a *promise* made to him, but an ' *argument* ' by means of which he *induced* him to purchase the ships. The overall context of the letter and especially the two paragraphs quoted above are evidence of Major Laing's primary purpose, viz. to ' reduce the liability against the Ministry of Shipping as rapidly as possible ' and to secure a purchaser for the ships then building at Hong Kong. In furtherance of this purpose, by emphasising the economic advantages of the location of the ships and of a ' free charter-party ', and evidently convincing Mr. G. Ambatielos that the delivery dates given by the builders could be depended upon, Major Laing, as the letter states, *induced* him to purchase the ships on behalf of his brother.

" The letter has to be considered in connection with the evidence, chiefly the testimony of Mr. G. Ambatielos, that Major Laing invariably refused to insert fixed dates in the written contract. The Commission is of opinion that this attitude of Major Laing could be regarded by the United Kingdom Government as corroborating its case that there was no binding agreement for fixed dates. The Commission is unable to understand why the two parties, having agreed on a transaction which was to take the form of a written contract, should have made a vital and essential condition of that transaction the subject of a verbal agreement operating concurrently with the written contract.

" The lack of evidential value of the Laing letter is corroborated by the affidavit of Mr. N. E. Ambatielos read in the Court of Appeal on 5th March, 1923, wherein he said:

> " ' Before the trial of this action I had a conversation with Major Laing concerning matters in question in this action. . . . Major Laing mentioned the existence of certain confidential letters. . . . Mr. Laing read me *a part* of the contents of the letter, but refused to show me the letters or to give me copies thereof. . . . I did not receive from the extracts read to me or from the conversation which I held with Major Laing a correct impression as to the meaning of the letters. *In particular, I did not understand that they confirmed my case as to the delivery of the vessels on dates certain.*'

" A similar statement was made in another affidavit read on the same occasion viz. an affidavit by Mr. F. P. D. Gaspar a member of the law firm of William A. Crump & Son, solicitors for Mr. Nicholas E. Ambatielos. In paragraph 3 of his affidavit Mr. Gaspar said:

> " ' The defendant contended that in addition to the written terms embodied in the said contract it was verbally agreed by the said Major Laing *at the time at which the said contract was entered into*, that the said steamships should be delivered to the defendant on dates certain.'

" 'Then in the final paragraph the deponent declares: " Major Laing refused to give me any statement or proof at any time either before or during the trial." '

" Why Major Laing refused to make clear his position prior to the proceedings before Mr. Justice Hill, with the result that he awakened fear or suspicion as to what he would say in evidence, particularly in cross-examination, and consequently was not called as a witness by Mr. Ambatielos, is something which, in the opinion of the Commission, can easily be explained. He would have found it very difficult to tell the Court why he had refused to put dates into the written contract (as testified by Mr. G. Ambatielos and other witnesses) and had at the same time said that he was binding the United Kingdom Government to deliver ships on fixed dates. He also would have found it very difficult to explain why he had pretended (as Mr. Nicholas Ambatielos testified) to make an agreement on behalf of the Ministry of Shipping in August, 1919, about sharing losses on freights.

" Another document in the possession of the United Kingdom Government and one to which the Greek Government attached great weight is the cablegram relative to the s.s. *War Trooper*, renamed *Ambatielos*, referred to as having been sent by Sir John Esplen, a member of the Committee of the Ministry of Shipping on 31st October, 1919. According to the Greek Case this ship was to be delivered on or before 30th September, 1919. (Greek Case paragraph 24.) The cablegram reads as follows:

" 'From Esplen, Shipminder to Britannia, Hong Kong. Following for Dodwell, *War Trooper*. As the steamer was sold to buyers for delivery not later than November it is of utmost importance that she should be completed by that date stop Cable immediately progress of construction.
(Signed) M. J. STRAKER.'

" In the Statutory Declaration made by Major Laing on 19th January, 1934, he said with regard to this telegram:

" 'This was sent because the Committee was becoming worried at the continual delay and they foresaw either cancellation of the contract or a claim being made against them.'

" The story of how that cable message was produced is told in a different manner by Mr. G. E. Ambatielos in his evidence before Mr. Justice Hill. His version was that the cablegram was not sent by order of either Sir John Esplen or the Committee, but on the personal instructions of Major Laing. Here is the relevant part of the evidence:

'Q. Were you there when he gave the instructions?
'A. Yes; I was there when the instructions were given; but I was not there when the telegram was sent.

'Q. What instructions did he give? Did he call in a clerk?
'A. He called this Miss Straker, who was acting as his secretary as well as the secretary to Sir John Esplen.

'Q. What did he say to her?

'A. He said: " You must immediately wire that definite date has been agreed in respect to the steamer '*War Trooper*', and that steamer must be delivered by that date ", and he turned round to me and said: " I cannot make it any stronger ", and he left.'

" In conformity with the facts and considerations set forth above, the Commission finds that none of the documents which are known to have been in the possession of the United Kingdom Government at the time of the 1922 proceedings and which were not shown to the advisors of Mr. Ambatielos or produced to Mr. Justice Hill (*i.e.* documents in category (*b*)) was necessarily inconsistent with the case put forward by the United Kingdom Government. It is the view of the Commission that none of the said documents constituted evidence strong enough to satisfy the United Kingdom Government and its legal advisers that a binding oral agreement had been entered into guaranteeing fixed dates for the delivery of the vessels and supplementing the written contract of 17th July, 1919.

" After this finding of fact the Commission will consider the point of law involved in the first submission of the Greek Government hereinbefore examined, to wit: whether a Government which institutes an action contrary to documents in its possession does thereby deny ' free access to the Courts ' to an alien defendant. The Commission is of opinion that ' free access ' is something entirely different from the question whether cases put forward in Courts by Governments are right or wrong, and that denial of ' free access ' can only be established by proving concrete facts which constitute a violation of that right as understood and defined in this award. The Commission finds, therefore, that in putting forward the case herein referred to, the United Kingdom Government did not deprive Mr. Nicholas E. Ambatielos of his right of free access to the Courts afforded to him by Article XV of the Treaty of 1886.

" The second submission is that:

" '*The British Government withheld those documents, thereby preventing Mr. Ambatielos knowing that they were putting forward a case of that kind, namely, a case known to be false.*'

" The line of reasoning developed in connection with the first submission is applicable to the second. The notion of ' free access to the Courts ' does not comprise an obligation on the part of Governments to disclose to an opponent in litigation, before or during the trial, all documents in its possession. If it were held, as intimated at the hearing, that considerations of equity and fairness impose upon the State an obligation to make known to an alien opponent all documents that have or may have a bearing on the case, even if they are favourable to the alien, such considerations would be of no avail in the present controversy, which can only be decided on legal grounds. No provision in Article XV of the Treaty of 1886 imposes such an obligation on the Contracting Parties. The non-disclosure here alleged would constitute a denial of ' free access ' if it could be shown that the act of non-disclosure does not conform with English law or that that law gives to British subjects, and not to foreigners, a right to discovery, thereby establishing a discrimination between nationals and foreigners. No evidence to that effect has been produced in the present case. Accordingly, the Commission finds that the withholding of certain documents in the action brought against Mr. Nicholas E. Ambatielos by the United Kingdom Government did not prevent the defendant from exercising his right of free access to the Courts guaranteed to him by Article XV of the Treaty of 1886.

" The third submission is that:

> " ' *The British Government did so in circumstances in which they knew that Mr. Ambatielos had no power to compel them to disclose those documents, they having the right to refuse to disclose them.*'

" This submission, as set out, virtually decides by itself the question raised. Once it is recognised that the Government had a right to refuse to disclose the documents, and hence, that the non-disclosure was in conformity with English law and practice, the fact stated above does not constitute a violation of the right of free access to the Courts. Moreover, if the Government knew that Mr. Ambatielos had no power to compel it to disclose the documents because the Government was entitled to refuse discovery, such a knowledge was a natural consequence of the exercise of the right to refuse, and not a wrongful act. The Commission, therefore, finds that the fact set out in the third submission was not a violation of the right of Mr. Nicholas E. Ambatielos to have free access to the English Courts as defendant in the action brought against him by the Government of the United Kingdom. The Commission thinks it right to add that the reason for the words ' they having the right to refuse to disclose them ', which are used by the Greek Government in the third submission quoted above, was that the Maclay-Laing letters clearly fell within the class of documents privileged from disclosure or production in English law as documents coming into existence solely for the purpose of enabling legal advisers to prepare a case for trial. The departmental minutes and files fall within a class of documents which, if and when expressly called for in the appropriate manner, may, under English law, be withheld on the ground that the production of that class of document is contrary to the public interest.

" If any contention that any documents were withheld contrary to English law, had been made and persisted in, which was not the case, the Commission would have had to consider the effect of that circumstance on the application of the rule of non-exhaustion of legal remedies.

" *Non-Exhaustion of Local Remedies.*—In countering the claim of the Greek Government the Government of the United Kingdom relies on the non-exhaustion by Mr. Ambatielos of the legal remedies which English law put at his disposal.

" One of the questions which the Commission is requested to determine is ' The question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty.' The Commission notes that the question raised by the United Kingdom Government covers all the acts *alleged* to constitute breaches of the Treaty.

" The Commission will therefore examine the validity of the United Kingdom objection independently of the conclusions it has reached concerning the validity of the Ambatielos claim under the Treaty of 1886.

" The rule thus invoked by the United Kingdom Government is well established in international law. Nor is its existence contested by the Greek Government. It means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken up on the international level by the State of which the persons alleged to have been injured are nationals.

" In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used. The views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule. Remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action.

" The Greek Government contends that in the present case the remedies which English law offered to Mr. Ambatielos were ineffective and that, accordingly, the rule is not applicable.

" The ineffectiveness of local remedies may result clearly from the municipal law itself. That is the case, for example, when a Court of Appeal is not competent to reconsider the judgment given by a Court of first instance on matters of fact, and when, failing such reconsideration, no redress can be obtained. In such a case there is no doubt that local remedies are ineffective.

" Furthermore, however, it is generally considered that the ineffectiveness of available remedies, without being legally certain, may also result from circumstances which do not permit any hope of redress to be placed in the use of those remedies. But in a case of that kind it is essential that such remedies, if they had been resorted to, would have proved to be *obviously futile*.

" Here a question of considerable practical importance arises.

" If the rule of exhaustion of local remedies is relied upon against the action of the claimant State, what is the test to be applied by an international tribunal for the purpose of determining the applicability of the rule?

" As the arbitrator ruled in the *Finnish Vessels* Case of 9th May, 1934,[1] the only possible test is to assume the truth of the facts on which the claimant State bases its claim. As will be shown below, any departure from this assumption would lead to inadmissible results.

" In the *Finnish Vessels* Case the issue was whether a means of *appeal* which had not been used by the claimants ought to be regarded as ineffective.

" In the Ambatielos Case, failure to use certain means of appeal is likewise relied upon by the United Kingdom Government, but reliance is also placed on the failure of Mr. Ambatielos to adduce before Mr. Justice Hill evidence which it is now said would have been essential to establish his claims. There is no doubt that the exhaustion of local remedies requires the use of the means of procedure which are essential to redress the situation complained of by the person who is alleged to have been injured.

" In paragraph 109 of its Counter-Case, the United Kingdom Government says the following concerning this point:

> " ' The " local remedies " rule . . . finds its principal field of application in the two requirements (*a*) that the complainant should have availed himself of any right given him by the local law to take legal proceedings in the local courts; and (*b*) that having done so, he should have exhausted the possibilities of appealing to a higher court against any adverse decision of a lower one. The application of the rule is not, however, confined to these two cases. It also requires that during the *progress*, and for the purposes of any particular proceedings in one of the local courts, the complainant should have availed himself of all such *procedural* facilities in the way of calling witnesses, procuring documentation, etc., as the local system provides.'

" The Commission shares this view in principle. At the same time it feels that it must add some clarifications and reservations to it. Although this question has hardly been studied by writers and although it does not seem, hitherto, to have been the subject

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[[1] *Finnish Vessels in Great Britain during the War* (*Finland* v. *Great Britain*): *Annual Digest*, 1933–1934, Case No. 91, at pp. 237–238, 240.]

of judicial decisions, it is hardly possible to limit the scope of the rule of prior exhaustion of local remedies to recourse to local courts.

" The rule requires that ' local remedies ' shall have been exhausted before an international action can be brought. These ' local remedies ' include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane. In this sense the statement in paragraph 109 of the Counter-Case seems to be sound.

" It is clear, however, that it cannot be strained too far. Taken literally, it would imply that the fact of having neglected to make use of some means of procedure—even one which is not important to the defence of the action—would suffice to allow a defendant State to claim that local remedies have not been exhausted, and that, therefore, an international action cannot be brought. This would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable.

" In the view of the Commission the non-utilisation of certain means of procedure can be accepted as constituting a gap in the exhaustion of local remedies only if the use of these means of procedure were essential to establish the claimant's case before the municipal courts.

" It is on the assumption that the statements of the claimant Government are correct that the international tribunal will be able to say whether the non-utilisation of this or that method of procedure makes it possible to raise against a claim a plea of inadmissibility on the ground of non-exhaustion of local remedies.

" *Have the local remedies been exhausted with regard to Claim A?*

" Claim A is a claim for compensation for breach of the contract of sale by the United Kingdom Government. The breach alleged is that the vessels which Mr. Ambatielos bought at an agreed price and on condition that they were to be delivered to him on certain fixed dates, which had been agreed upon between the Parties, were not in fact delivered on those dates. Compensation is claimed for the damage caused to Mr. Ambatielos as a result of this breach of contract.

" The United Kingdom Government has raised the question of the non-exhaustion of local remedies in the English Courts in so far as concerns the acts which are alleged to constitute breaches of the Treaty of 1886.

" The principal act which is alleged by the Greek Government to constitute a breach of that Treaty is the alleged breach of contract aforesaid.

" As regards Claim A, the questions of the non-exhaustion of local remedies thus raised are:

" ' (1) In the 1922 proceedings Mr. Ambatielos failed to call (as he could have done) the witnesses who, as he now says, were essential to establish his case.'

" With regard to Major Laing, the Greek Government has primarily contended that Mr. Ambatielos was prevented from calling Major Laing as a witness before Mr. Justice Hill because Major Laing—though not heard—had been subpoenaed to appear as a witness for the Crown. In the course of the proceedings before the Commission, however, the Parties agreed that the fact that Major Laing had been subpoenaed by the Crown would not, under English law, have precluded Mr. Ambatielos from calling Major Laing as a witness before Mr. Justice Hill.

" The Greek Government further contends that if Mr. Ambatielos had called Major Laing as a witness, the decision of Mr. Justice Hill would have been favourable to him; this is a contention which is disputed by the United Kingdom Government.

" It is not possible for the Commission to decide on the evidence before it the question whether the case would have been decided in favour of Mr. Ambatielos if Major Laing had been heard as a witness. The Commission has not heard the witnesses called before Mr. Justice Hill and cannot solely on the documentary evidence put before the Commission form an opinion whether the testimony of Major Laing would have been successful in establishing the claim of Mr. Ambatielos before Mr. Justice Hill. The Commission cannot put itself in the position of Mr. Justice Hill in this respect.

" The test as regards the question whether the testimony of Major Laing was essential must therefore be what the claimant Government in this respect has contended, viz. that the testimony of Major Laing would have had the effect of establishing the claim put forward by Mr. Ambatielos before Mr. Justice Hill.

" Under English law Mr. Ambatielos was not precluded from calling Major Laing as a witness.

" In so far as concerns Claim A, the failure of Mr. Ambatielos to call Major Laing as a witness at the hearing before Mr. Justice Hill must therefore be held to amount to non-exhaustion of the local remedy available to him in the proceedings before Mr. Justice Hill.

" It may be that the decision of Mr. Ambatielos not to call Major Laing as a witness, with the result that he did not exhaust local remedies, was dictated by reasons of expediency—quite understandable in themselves—in putting his case before Mr. Justice Hill. This, however, is not the question to be determined. The Commission is not concerned with the question as to whether he was right or wrong in acting as he did. He took his decision at his own risk.

" The testimony of Major Laing must be assumed to have been essential for the success of the action of Mr. Ambatielos before

Mr. Justice Hill. It could have been adduced by Mr. Ambatielos but was not in fact adduced. Mr. Ambatielos has therefore not exhausted the local remedies available to him in the proceedings before Mr. Justice Hill.

" The Commission, having accepted the contention of the Greek Government that the evidence adduced by Major Laing if he had been heard as a witness would have resulted in a decision of Mr. Justice Hill favourable to Mr. Ambatielos, the question whether Mr. Ambatielos was prevented by the United Kingdom Government from adducing other evidence which might have led to the same result does not seem to be relevant to the question whether the failure of Mr. Ambatielos to call Major Laing as a witness must be considered as amounting to a non-exhaustion of the local remedy available to him in the first instance. If a man can secure help by taking course *A* *or* course *B* and is prevented from taking course *A*, he fails to exhaust his remedies if he refrains from taking course *B*.

> " (2) The second question as to non-exhaustion raised by the United Kingdom Government is the failure of Mr. Ambatielos to make use of or exhaust his appellate rights.

" As the Commission has assumed, for the purposes of the test which it has accepted, that the testimony of Major Laing was essential to establish the claim of Mr. Ambatielos before Mr. Justice Hill, and as it has decided that the omission to produce that evidence constituted a failure to exhaust the remedy available to Mr. Ambatielos in the proceedings before Mr. Justice Hill, it might seem superfluous to consider the second question which has been raised.

" Nevertheless it may be pertinent to state that the failure of Mr. Ambatielos to prosecute the general appeal which he had lodged against the decision of Mr. Justice Hill would ordinarily be considered a failure to exhaust local remedies. Such failure requires some excuse or explanation.

" The refusal of the Court of Appeal to give leave to adduce the evidence of Major Laing did not, of course, in itself prevent this general appeal from being proceeded with.

" The Greek Government argues by way of explanation that to proceed with the general appeal once the decision of the Court of Appeal not to admit the Laing evidence had been given would have been futile because the Laing evidence was essential to enable the Court to arrive at a decision favourable to Mr. Ambatielos.

" The reason why Mr. Ambatielos was not allowed to call Major Laing in the Court of Appeal was, in the words of Lord Justice Scrutton, that ' One of the principal rules which this Court adopts is that it will not give leave to adduce further evidence which might have been adduced with reasonable care at the trial of the action '.

" Accordingly, the failure of Mr. Ambatielos to exhaust the local remedy before Mr. Justice Hill, by not calling Major Laing as a witness, is the reason why it was futile for him to prosecute his appeal.

" It would be wrong to hold that a party who, by failure to exhaust his opportunities in the Court of first instance, has caused an appeal to become futile should be allowed to rely on this fact in order to rid himself of the rule of exhaustion of local remedies.

" It may be added that Mr. Ambatielos did not submit to the Court of Appeal any argument suggesting, or any evidence to show, that any illegal or improper manoeuvres by his opponents had prevented him from calling Major Laing or producing any documents.

" In so far as concerns the appeal to the House of Lords, it is of course unlikely that that Court would have differed from the decision of the Court of Appeal, refusing to allow Major Laing to be called as a witness in the latter Court. If it is held that such an appeal would *not* have been obviously futile, the failure of Mr. Ambatielos to appeal to the House of Lords must be regarded as a failure to exhaust local remedies. If, on the other hand, it is held that an appeal to the House of Lords *would* have been obviously futile, Mr. Ambatielos must likewise be held to have lost his hope of a successful appeal, by reason of his failure to call Major Laing.

" *Have the local remedies been exhausted with regard to Claim B?*

" If it were to be held that, contrary to the contention of the Greek Government, the contract did not contain any provision binding the United Kingdom Government regarding agreed dates for the delivery of the ships which had been sold to Mr. Ambatielos, the Greek Government claims in the alternative the return of £500,000 which, according to the contention of the Greek Government, was paid by Mr. Ambatielos in consideration of agreed dates of delivery. The Greek Government claims this sum on the ground of ' unjust enrichment ', together with all damages, interest and costs resulting therefrom.

" This claim has not been before an English Court.

" The Greek Government contends that it would have been futile to submit such a claim to an English Court, on the ground that English law does not recognise unjust enrichment as a valid basis for a claim.

" The Commission is of opinion that it must first examine whether the claim as defined by the Greek Government can be said to constitute a claim for unjust enrichment.

" The Commission finds that this is not the case. Claim B is not, as the Greek Government contends, a ' quasi contractual ' claim. The claimed sum of £500,000 was only part of the price which Mr. Ambatielos was to pay for the ships (together with advantages of position and ' free charter-parties ') in accordance with the contract. Furthermore the full purchase price was not received by the United Kingdom Government. If however Claim B *had* been based on unjust enrichment, and had thus been independent of and alternative to claim A, the Commission is of opinion that Claim B would have failed, in so far as remedies *were* available in English law, on the ground that such remedies had not been tried—much less exhausted. The Commission has already decided that the Treaty of 1886 did not secure, for Greek subjects, remedies *not* available in English law.

" *Were the local remedies exhausted as regards Claim C?*

" Claim C refers to the position of Mr. Ambatielos on 4th November, 1920, (the date of the signature of the Mortgage Deeds) and rests on the argument that the sale of the *Mellon* and the *Stathis* should have been cancelled on that date, and not on the date of Mr. Justice Hill's judgment, viz. on 15th January, 1923.

" According to the Greek Government this claim is an alternative claim to Claim A.

" This claim was not before Mr. Justice Hill. The claim before Mr. Justice Hill concerning the *Mellon* and the *Stathis* was a claim by Mr. Ambatielos for damages for *non-delivery* of these two ships. Claim C is a claim for damages based on the contention that the United Kingdom Government, by *not cancelling the sale* of the *Mellon* and the *Stathis* on the date of the Mortgage Deeds, 4th November, 1920, but only at the trial of the action before Mr. Justice Hill, has caused Mr. Ambatielos damage in the amount stated in Claim C. It is the converse of the claim put forward before Mr. Justice Hill.

" The Greek Government has never contended that there was any obstacle to a recourse to local remedies in regard to this claim. But no claim was ever put forward before the English Courts. The Commission, therefore, finds that there has been, in regard to this claim, a non-exhaustion of local remedies.

" For these reasons,

" THE COMMISSION,

rejects the United Kingdom contention that there has been undue delay in the presentation of the Greek claim on the basis of the Treaty of 1886; finds that the claim is not valid having regard to the question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty; finds that the claim is not valid having regard to the provisions of the Treaty of 1886." (At pp. 12–32.)

[Report: *Award of the Commission of Arbitration* (with Annexes) (London, H.M.S.O., 1956).]

NOTE.—Professor Alfaro, President of the Commission, appended an Individual Opinion dealing with the question of non-exhaustion of legal remedies with regard to claim A. Professor Spiropoulos appended a Dissenting Opinion.

State Responsibility—For Breaches of Contractual Obligations—Breach of Concessionary Contract—Refusal to Pay Lighthouse Dues on Requisitioned Ships—Exemption for "Warships Properly So-called"—Meaning of—Conversion of Merchantmen.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claim No. 1 (*Second Part*).

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *infra*, p. 659.) As to the first part of this Claim, relating to the period of the Greek belligerent occupation of Turkish territory in 1912 and 1913, see *infra*, p. 801. The Tribunal now considered the legal effect of the refusal of Greece to pay to Collas & Michel lighthouse dues after the acquisition of territorial sovereignty, that is, between 1913 and 1924.

Held: that the claim must succeed. Only those requisitioned ships which had been so converted that they were capable of taking effective part in military operations were exempt from dues as "warships properly so-called". It was for Greece to prove conversion. The Tribunal gave leave to the Greek Government to put in evidence of which ships had been fully converted.

The Tribunal said: "The default of Greece at first, and her subsequent refusal, to pay the lighthouse dues laid down for requisitioned ships reveal a tendency which had appeared during the period of the military occupation of New Greece and which was continued and accentuated after the acquisition of territorial sovereignty, from May 1913 until 1924.

"Although the juridical foundation of the responsibility of Greece under this head is quite different for the two periods—excess of the international law powers of the occupying Power in the one case, failure to comply with the provisions of the concessionary contract as grantor State by subrogation in the other—the claim relating to the non-payment of lighthouse dues for requisitioned ships ought nevertheless to be judged for the two periods in the light of the same provisions for exemption, namely, paragraphs 5 and 6 of Article XIV of the Concession of 1860 (as continued in force). The Tribunal refers to what it said on the subject [the first part] of this Claim.[1] The same considerations apply for the second period and the same conclusion follows.

"The Tribunal considers that by 'warships properly so-called' in the sense of Article XIV, paragraph 5 of the Concession of 1860 (as continued in force) may properly be understood ships capable in

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[[1] See *infra*, p. 801.]

view of their armament of taking effective part in military operations. The only requisitioned ships, therefore, which are to be regarded as exempt are those which were transformed into auxiliary battle ships, such as cruisers, torpedo-boats, torpedo-boat destroyers, minelayers and minesweepers; and particularly not exempt are troop transports, ammunition and supply ships and hospital ships.

" It is for the Greek Government to prove conversion. The Tribunal will permit the said Government to establish by supplementary documents which vessels, over and above those in respect of which documentary proof has already been furnished, were converted into warships properly so-called within the meaning which the Tribunal has just given to that expression. The object of that proof will be found in the operative part of this award."[1]

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 98.]

State Responsibility—For Breaches of Contractual Obligations—Breach of Obligation under Concessionary Contract—Failure to Increase Tariffs to Allow for Devaluation of Currency as Breach of Obligation—Principle of Good Faith—Adequacy of Increases—Irrelevance of Principles of Municipal Law—Irrelevance of Principles of Private International Law—Relevance of International Character of Turkish Lighthouses Concession—Rejection of " Gold Tariff " as Basis of Claim—Rejection of Similar Increases in Tariffs Elsewhere as Basis of Quantum—Adoption of " Normal Working " Profits as Measure of Compensation.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claim No. 26.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *infra*, p. 659.) This was a claim for compensation for the fact that, during the period 1919–1929, Collas & Michel were able to collect lighthouse dues only under a tariff expressed in drachmas of which the real value was constantly falling, while the original Turkish tariff of 1860 was a tariff based on gold values. The claim was presented under the rubric " *Péréquation à l'or des recettes* "[2] (gold equalization of receipts).

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[1] See *infra*, at p. 805.

[2] As to which the Tribunal said (at p. 109): " This expression '*péréquation à l'or*' appears in a quite different context, namely, in the firm's argument that all monies to be awarded to it under the various other heads of claim and expressed in devalued currencies ought to be re-valued in gold values. This last claim, which is quite general in its nature, will be examined in the concluding part of this Award [see *infra*, at p. 674]. For the moment, only *Claim No.* 26, concerning solely the loss suffered by the firm owing to the progressive devaluation of the drachma in the tariff of lighthouse dues, is in question.

" The Tribunal will not use the expression '*péréquation à l'or*', which does not seem to it to be appropriate, but prefers the phrase 'application of the tariff of lighthouse dues according to their equivalent in gold values.' "

For Collas & Michel it was contended that (a) the original tariff of 1860 was always regarded as a gold tariff; (b) the account of the Turkish State against the firm, consisting of a percentage of the lighthouse dues, was in 1904, 1907 and 1913 assigned by Turkey in favour of a group of creditors who had to be paid in gold currency; (c) the re-adaptation of the concessions to the new economic conditions provided by Article 4 of Protocol XII annexed to the Treaty of Lausanne[1] had, as one of its main objects, an increase in the tariff in order to bring it up to gold level; (d) the other succession States of the Ottoman Empire had, at the time of the adaptation of the concessionary contract for their zone after 1924, recognized that the firm's case was well founded; (e) in any event, it was necessary to restore the equilibrium of the concession which was upset by the devaluation of the currency.

With regard to (c), the Greek Government challenged, albeit hesitantly, the competence of the Tribunal to deal with a claim founded on the provisions of Protocol XII of the Treaty of Lausanne for the re-adaptation of the concessions to the new economic conditions.

Held: that the Tribunal had jurisdiction to hear the claim, which was not one of the matters for which Article 5 of Protocol XII provided special procedures, and that the claim must succeed. The arguments based on the idea of a "gold tariff" must be rejected, but the Greek Government was bound by the principle of good faith to make adequate increases in the tariffs to compensate for the loss caused by the devaluation of the drachma. Its failure to do so constituted a breach of the concession contract. The Tribunal ordered an expert enquiry to ascertain the amount due.

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[1] Protocol XII provided in part as follows:

"*Article* 1. Concessionary contracts and subsequent agreements relating thereto, duly entered into before the 29th October, 1924, between the Ottoman Government or any local authority, on the one hand, and nationals (including Companies) of the Contracting Powers, other than Turkey, on the other hand, are maintained."

"*Article* 4. Subject to the provisions of Article 6, the provisions of the contracts and subsequent agreements referred to in Article 1 shall, by agreement, and as regards both Parties, be put into conformity with the new economic conditions."

"*Article* 5. In the absence of agreement within one year from the coming into force of the Treaty of Peace signed this day, the Parties will adopt the provisions regarding both the settlement of accounts and the readaptation of concessions, which are considered suitable and equitable by two experts, to be nominated by the Parties within two months from the expiration of the period of one year mentioned above. In case of disagreement, these experts will refer the question to a third expert selected within two months by the Turkish Government from a list of three persons, nationals of countries not having participated in the war of 1914–1918, prepared by the head of the Swiss Federal Department of Public Works."

"*Article* 9. In the territories detached from Turkey under the Treaty of Peace signed this day, the State which acquires the territory is fully subrogated as regards the rights and obligations of Turkey towards the nationals of the other Contracting Powers, and companies in which the capital of the nationals of the said Powers is preponderant, who are beneficiaries under concessionary contracts entered into before the 29th October, 1914, with the Ottoman Government or any local Ottoman authority. The same provision will apply in territories detached from Turkey after the Balkan Wars so far as regards concessionary contracts entered into with the Ottoman Government or any Ottoman local authority before the coming into force of the Treaty providing for the transfer of the territory. This subrogation will have effect as from the coming into force of the Treaty by which the transfer of territory was effected except as regards territories detached by the Treaty of Peace signed this day, in respect of which the subrogation will have effect as from the 30th October, 1918."

The Tribunal said: " [*On the question of competence.*] The Tribunal does not think that there are any grounds for calling into question its power to examine this head of claim solely because Article 5 of Protocol XII laid down in the absence of agreements between the parties special procedures by experts to settle the conditions for the re-adaptation. The firm of Collas & Michel have not formally asked for a re-adaptation of the concession on the basis of Article 5, which the Tribunal would certainly have been incompetent to effect. The claim is quite outside the framework of Article 5 of Protocol XII of 1923 and comes within the group of pecuniary claims which were referred in 1931 by Article 7 of the arbitration *Compromis* to the Tribunal. It is not, indeed, a matter of deciding between the parties to a dispute which has arisen between them on the appropriate and equitable conditions of a compulsory re-adaptation discussed between them before August 6, 1925, without any agreement being reached, but, on the contrary, it is one of ascertaining the total sum due to the firm by Greece for having neglected to include in the new tariff of lighthouse dues the increases required by the new economic conditions. Seen from that aspect, the claim is a proper one.

" [*On the merits of the dispute.*] The Tribunal observes in the first place that this is not the first time that a dispute concerning the ' gold tariff ' in the former Ottoman concession has come before an international tribunal. It appears to be of a more general character. Indeed, the dispute has already played a part before the Permanent Court of International Justice in 1925 in regard to the *Mavrommatis Concessions in Jerusalem*, in which case, however, the dispute found no judicial solution.[1]

" The question whether the tariff of lighthouse dues decreed in 1860 by the Ottoman Sultan and annexed to the first concessionary contract was a gold tariff, cannot be resolved on the basis of modern practice and theory concerning the scope of clauses in private law contracts which impose on a debtor the obligation of paying a determinate sum to the creditor. Whatever may be the intrinsic value of such practice and theory, they have no value for the matter under discussion.

" In the present case, there is a totally different situation, in which neither the theory of the necessity of an express contract-gold or gold-value clause nor the civil law doctrinal difference between national and international payments can be decisive. In order to interpret the scope of a tariff of charges for public services, even though the collection of such charges has been granted to a private firm, it is necessary to take into consideration the proper nature of such a tariff of dues intended to pay—always with a greater or smaller margin of profit—for services rendered. A tariff like that of 1860 for lighthouse dues, emanating from the sovereign authority, does not, of course, mention gold as the basis upon which it rests, especially when it is promulgated at a time when gold currency is in force. It cannot reasonably be supposed that the sovereign authority intended to fix once and for all the dues to be paid at the gold level, even in the event of a devaluation of the national currency. And no judicious concessionaire would rely on it. That does not mean at all, in any event, that one could assume the contrary, that is to say, that the sovereign authority, in fixing the tariff, intended to maintain it, without variation, at its original monetary level, whatever might happen to the national currency. The same reasoning requires—as is confirmed by normal practice—that tariffs increase more or less rapidly, and in a manner more or less adequate, with the devaluation of the national currency or the increase in the cost of living. That is common experience when the State itself runs a public service and a concessionaire will properly rely on the grantor State's doing the same, when it is a question of a public service given by way of concession to a private firm. Such a conclusion is required by the principle that every contract must be interpreted and applied in good faith. It is, moreover, in harmony with the interests of the State which takes a share of the receipts. The re-adaptation of concessions prescribed in Protocol XII of Lausanne does no more than sanction, by a positive provision, a reasonable principle, not in the sense of a revaluation in gold, obligatory and automatic, proportionate to the devaluation of the currency, but in the sense of an adjustment based on good faith. This re-adaptation generally operates only with a retarded rhythm and to an incomplete extent.

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[1] See Judgment of March 26, 1925 (*P.C.I.J.* Series A, No. 5, pp. 50 *et seq.*; *Annual Digest*, 1925–1926, Case No. 158).

" Hence, the re-adaptation arrived at between Collas & Michel and the other succession States after 1924 in no way proves a general acceptance of the gold theory.

" It is equally impossible to interpret in that sense a clause dating from 1860 in support of the argument that since 1904, certain contracts for gold loans concluded by the Ottoman Government, under the guarantee of an anticipatory assignment to the creditors were of the part of the income belonging to the Ottoman State. A close connection does exist between the concession and the loans, but not that which the concessionaire firm desires to see there.

" Although, in consequence, the argument concerning the gold tariff must be rejected, and although none of the arguments (a)–(d) could tip the balance in favour of the claim of Collas & Michel, it is otherwise with argument (e). Indeed, the principle of good faith in the interpretation of the concession required that, by reason of the devaluation of the drachma and the resulting disturbances of the financial equilibrium of the concession, the successor State should proceed to the necessary measures to ensure the continuation of the concession on equitable terms. In this special case, the existence of such an obligation on the part of the Greek State is the necessary consequence of Article 9 of the same Protocol which, by stipulating for the subrogation of the succession States to the concession, implied the obligation for them to ensure, in particular by an increase in the tariffs, its normal life until the end of its term. The default of the Greek Government, which did not decide in time on the necessary measures—which would, moreover, have had to be taken by the process of re-adaptation provided for by Article 5 of Protocol XII—constitutes therefore the disregard of a contractual obligation.

" The Greek Government has declared itself ready to allow Collas & Michel to profit by the successive increases in the tariffs of other public services enacted by Greek legislation, amounting respectively to quadruple (1924), quintuple (1925), sextuple (1926), ninefold (1932) and tenfold (1933), and it would in fact be discriminating against the firm to refuse to grant to it what has been conceded to other comparable undertakings.

" But the question remains, whether these increases can be regarded as sufficient. That the dispute can be resolved solely on the basis of Greek municipal law and solely by the application of the principles of private international law, is an argument which the Tribunal could not admit.

" The control of the lighthouses of the Ottoman Empire had, since the Crimean War, always been treated as a matter of eminently international interest. The documents laid before the Tribunal supply numerous proofs of this. The Ottoman Government on several occasions commenced *pourparlers* on the subject with foreign Powers, and not only with France. The intention of the Great Powers and Turkey in regard to the construction of two new lighthouses in Crete (see *Claim No.* 11)[1] is a proof of that, and another proof, resulting from the same documents, lies in the fact that the Ottoman Government consented at the request of the Great Powers in 1896 to a reduction in the lighthouse tariff.

" The lighthouse concessions of the Ottoman Empire, like certain other concessions, after the Balkan Wars remained a matter of international interest and regulation—witness the mandate given by Article 6 of the Treaty of Peace of London of May 30, 1913, to the International Financial Commission convoked in Paris; the deliberations which took place in that Commission; the new provisions of Article 5 of the Greco-Turkish Treaty of Peace of Athens of November 1/14, 1913, relating to respect for acquired rights; the

[[1] *Supra*, p. 81.]

definitive regulation contained in Protocol XIV annexed to the Treaty of Lausanne; the re-adaptation which followed it; and the proceedings before the Permanent Court of International Justice to which the concessions gave rise between 1924 and 1927 and in which Greece herself was the plaintiff as intervening power in favour of a Greek concessionaire whose rights had been prejudiced by the Mandatory Power in Palestine.[1]

"The Greek Government, for its part, never refused to enter upon direct *pourparlers* with the foreign minister or the diplomatic representatives of France when difficulties arose between it and Collas & Michel; and it never took the position that the concessionary relations were strictly national in character. In any case, the arbitration *Compromis* of 1931, continuing this practice, submitted directly to this Tribunal all the pecuniary claims of the firm against the Greek Government, among which that relating to the increasing insufficiency of the tariff of lighthouse dues was one of the principal.

"The sufficiency or insufficiency of the successive increases of the lighthouses dues under Greek legislation therefore presents in this case a clearly international aspect, which is confirmed and emphasized still further by Protocol XII of Lausanne.

"The Tribunal has before it two theses. The French argument claims the gold equalization of the tariffs. The Greek argument proposes to apply to the tariffs imposed in New Greece the same increases which were applied in Old Greece. These two opposed theses present a common characteristic—they both constitute what one might call objective theses.

"The French thesis, which starts from the devaluation of the drachma, would lead to applying to the tariff an increase proportionate to their devaluation. [According to a letter from the Bank of Greece, that devaluation, which commenced in 1919, as regards the average price in paper drachmae of the gold drachma containing 0.29032258 gr. of pure gold, ranged from 1,068 in 1919 to 14,781 in 1928.] These figures, which are not contested, could serve as the basis of a decision. However, the application of these facts would lead to a result identical with that which would have been produced by the stipulation of a gold tariff, a course which the Tribunal has formally rejected.

"The Greek thesis envisages the application to the tariffs imposed in New Greece of the increases ordered by the Greek authorities in Old Greece, which, by the application of the principle of non-discrimination, would constitute the minimum of the increases which Collas & Michel could claim. If the Tribunal were to adopt

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[[1] *I.e.*, the *Mavrommatis Jerusalem Concessions Case* (*P.C.I.J.*, Series A, No. 5; *Annual Digest*, 1925–1926, p. 407), and the *Case of the Readaptation of the Mavrommatis Jerusalem Concessions* (*Jurisdiction*) (*P.C.I.J.*, Series A, No. 11; *Annual Digest*, 1927–1928, p. 50).]

this thesis, it would in any event be proper to subject it to two modifications. On the one hand, the dates on which the adaptations should come into force in New Greece ought to be put back to an earlier time, a solution which is perfectly compatible with the guiding idea of Protocol XII of Lausanne, which in no way excludes the possibility of rectifying injustices retroactively. . . .

" Other objective facts could have been invoked by one or other of the parties: the fluctuations in Greece of the general cost of living and salary indices; the adaptations which Greece herself has applied to other concessions in operation on her territory; and the re-adaptations applied in like manner by other succession States of Turkey.

" In view of the uncertain and sometimes incoherent, or even contradictory, nature of the results obtained by the application of these diverse methods, and in particular in view of the difficulty experienced by the Tribunal in obtaining sufficiently certain and precise statistics concerning the index numbers, and by reason of the lacunae which exist on many points in the documents produced before the Tribunal, the latter has sought the elements of a possible solution in another direction, one which could be termed ' subjective ' and which leads to taking considerable account of special situations, having regard to the circumstances of time and of place in which the interested parties found themselves. Thus, the Tribunal has been enabled to envisage, among the various directions in which it might proceed, the increases in the cost of the operation of the lighthouses which would have taken place if during the period under examination the firm had continued it normally.

" By reason of the relationship which ought to exist in every business between income and expenditure, the Tribunal has decided that the best way of determining the increase which there ought to have been in income would be to call for precise information on the total of the cost which would have fallen on Collas & Michel if the latter had functioned in normal conditions. That method appears to the Tribunal to be the best with a view to avoiding two extreme solutions, both inadmissible—that is to say, on one hand the complete disappearance of profit, on the other, an excessive profit. That is the reason why, in the opinion of the Tribunal, the question of the costs appears as one of the most important elements of the problem.

" For reasons which will be set out [elsewhere in] this Award, in regard to the Greek *Counterclaims No.* 3–6,[1] and in regard to the repurchase of the concession,[2] the Tribunal does not believe that the documents so far lodged by the parties are sufficient to determine the total of these costs, and that is why it regards itself as being under the necessity to order an enquiry by an expert in order to determine the annual general costs charged to the concession in respect of the zone of New Greece."

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[1] [See *supra*, p. 99.]

[2] [See *supra*, p. 299.]

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 109.]

VI.—For Wrongs Unconnected with Contractual Obligations

i.—Acts and Omissions of State Organs and Officials

(b) EXECUTIVE ACTION OR INACTION

State Responsibility—For Wrongs Unconnected with Contractual Obligations—Acts and Omissions of State Organs—Executive Inaction—Claim for Cost Expended in Defence of Title to Land Allocated by Grantor State to Concessionaires—Allegation of Neglect or Refusal to Assist Concessionaires in Defence—Relevance of Fact of Occupation of Land for Long Period Without Payment.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claim No. 25.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *infra*, p. 659.) Collas & Michel claimed compensation for eviction, as the result of judicial process, from the peaceable possession of a building at Mytilene in the island of Lesbos which they had occupied almost from the beginning of the operation of their concession.

Under the terms of Article XIV of the original concessionary contract of 1860, the grantor State was to put at the disposition of the firm, without charge, the places which at that time were already used for the collection of lighthouse dues. In pursuance of this provision, it appears, during the first decade of its operation the firm occupied land at Mytilene which had been put at its disposition by the Ottoman Government as owner, and erected a building which it used as an office. At that time—as was proved by certain correspondence of 1879—there was some doubt as to the title of the Ottoman State to the property, the monastic Hospital of Mytilene claiming to be the owner under the will of the Metropolitan Anthimos, who died in 1752. So as to be able to use the land without further delay for the service, the firm's Director of Lighthouses in November 1870 came to a temporary *modus vivendi* with the monastic Hospital, under which the land was to be bought from the latter if its right of ownership were afterwards finally established; in the meantime, the firm were to pay the Hospital a rent of 400 Turkish piastres per annum. This rent appears, however, to have been paid only once, in December 1870; its payment seems to have been discontinued in the following year, the reason being that the Hospital refused to give a receipt for it in the form requested by the firm with a view to reserving any rights of the Ottoman State. (That development appeared from correspondence exchanged in 1873.) The matter rested there for about 10 years; the Ottoman Government continued to regard the land as the property of the State; the Hospital continued to regard itself as the owner; and the firm, who had undisturbed use of the land, paid no more rent to the Hospital. No proceedings relating to the ownership of the property appear to have been commenced by the Hospital before any court until 1930, at which time there developed a whole series of lawsuits concerning the ownership of the property. The first case was much later than the date of the transfer of the territorial sovereignty over Mytilene to Greece (February 13, 1914) and was not commenced until after the seizure by the Greek Government of the firm's concessions in New Greece in 1929. Although at that time the use of the land was not of any great value to the firm, the latter thought fit nevertheless, for reasons which do not clearly appear, to maintain their *de facto* position against the claims of the monastic Hospital by expending considerable sums on the defence by legal process of their rights as occupiers of the land. The proceedings which followed never went so far as to clarify the precise legal position of the land, nor, in consequence, under exactly what title the firm were in possession of it.

Held: that the claim must fail. The ownership of the land was uncertain, but, whoever owned it, the Greek Government was not responsible for the eviction of Collas & Michel. In any event, the firm had occupied the land for many years rent free.

The Tribunal said: " The Tribunal does not know whether, after [the actions in the Greek courts], none of which resolved the problem of the ownership of the land, new actions were commenced, but so far as the attitude of the parties permit the Tribunal to form an opinion, the matter seems to have rested there. In sum, the Greek courts appear to have:

> " admitted the existence of a tenancy agreement, dating from 1870, between the firm of Collas & Michel as tenant and the Hospital as landlord and at least the putative owner of the land;
>
> " dismissed the claim for arrears of rent made by the Hospital —a claim which in 1936 was said to depend . . . on the final solution of the problem of ownership, but dismissed in 1937 for lack of *légitimation passive* in the person of the defendant; and
>
> " left undecided the most interesting question relating to the

ownership of the land—whether it belonged to the monastic Hospital of Mytilene, or to the Greek State as successor to the property of the Ottoman Empire or perhaps it constituted *vakouf* property.[1]

" In the meantime, the firm's offices built on the land appear to have been demolished and ejection to have been carried out in execution of the judgments of 1933.

" What legal arguments can Collas & Michel invoke on the basis of the proceedings and judgments summarized above, to support their claim for compensation?

" The firm expressly declared that they were not thinking of inviting the Tribunal to invalidate by its award one or more of the judgments given by the Greek courts. The Tribunal could not, in fact, take that course in any event.

" Nor do the firm envisage asking the Tribunal to establish a denial of justice in the narrowest sense to be given to that conception, and to base therein some financial responsibility on the part of Greece.

" All that the firm have in view is to obtain compensation for the high costs to which they say they have been put in order to defend in legal proceedings the claims of the monastic Hospital relating to land which the grantor State had allocated to the concessionaries in pursuance of the concessionary contract of 1860, and for the neglect or refusal of the Greek Gonvernment, as grantor State by subrogation, to assist its concessionaires in their defence.

" [The Tribunal reviewed the terms of Article XV of the Concession of 1860, under which the Ottoman Government had to provide in certain cases office premises for the concessionaires.] The Ottoman Government in 1867 put at the disposal of Collas & Michel, free of charge, land suitable for building a collector's office, and the firm made use of it for sixty years. The grantor Government regarded the land as belonging to the State, and the monastic Hospital did nothing for more than a half century (even after the refusal of the firm to continue to pay rent) to establish at law its claim of ownership, a right which, moreover, no court had recognized, even when, from 1930 onwards, an avalanche of litigation descended upon Collas & Michel. For what in these circumstances can the grantor State be blamed?

" The only thing for which Greece, as grantor State by subrogation, can be blamed is the refusal by its Government of the firm's requests that it should intervene on their behalf in the pending suits. It does not clearly appear from the documents lodged why the Greek Government did so refuse, and the Tribunal can only conjecture. One reason for refusal can be justified, another cannot. The documents do not disclose precisely the reasons for the tenacity with which Collas & Michel clung to its position at Mytilene, after having been ousted from the collection of lighthouse dues, and expended sums of money as considerable as they say they have devoted to that end [*sc.* remaining at Mytilene]. Moreover, they have not established with sufficient precision the losses caused to them by these complicated proceedings. Nor must sight be lost of the fact that even if it could be established that the Turkish State was never the owner of the piece of land in dispute, that would not assist Collas & Michel in their claim, because then it would appear *a posteriori* that the Ottoman Government was never under the obligation, under Article XV of the concession of 1860, in the absence of available premises and land, to offer anything at all to the firm. In that event the firm would have had the benefit of free user [of the land] for sixty years, which would counterbalance the inconvenience of its judicial eviction in 1933.

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[1] " Property dedicated to God of which the revenue is consecrated to His poor."]

" In final sum, the Tribunal sees no convincing reasons to grant Claim No. 25, which is without sufficient basis in law or in fact."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 115.]

State Responsibility—For Acts and Omissions of State Organs and Officials—Executive Action—Eviction from Premises—Responsibility for Consequences of—Liability for Expenses of Removal—Non-Liability for Loss by Fire of Stores in Temporary Premises During Eviction—Absence of Causal Connection.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claims No. 19 *and* 21 (*Part*).

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—This claim arose out of the eviction, in 1915, by the Greek authorities of Collas & Michel from their offices in the port of Salonika. The reason given for the eviction was that one of the firm's staff was suspected of spying. Collas & Michel removed with their stores to temporary premises. In April 1917 the firm were allowed to return to their offices, but before the stores could be moved back they were lost in a fire which destroyed the temporary premises. Collas & Michel now claimed the expenses caused by their enforced removal (Claim No. 21 (part)) and the value of the stores lost in the fire (Claim No. 19).

Held: that the claim for the expenses of removal, including the rent of the temporary premises, must succeed, this being almost self-evident, especially as the Greek authorities had occupied and used Collas & Michel's offices for public purposes. The claim for the value of the lost stores must, however, fail as there was no causal connection between the eviction of Collas & Michel and the fire which destroyed the stores.

The Tribunal said: " In June 1915, the lighthouse administration was compelled to evacuate its offices at Salonika, with its equipment and stores, and to occupy other premises. It was not able to return to its offices until April 1917. But before the stores, of various kinds, which had been warehoused in the temporary premises were transferred back to the former offices, there occurred the fire of August 18, 1917, which completely destroyed the stores. Is Greece responsible for the losses caused to Collas & Michel either by the necessity for transferring their stores elsewhere (*Claim No.* 21) or by the fire (*Claim No.* 19)? That depends, on the one hand, on the legality of the compulsory evacuation and, on the other hand, on the relationship of cause and effect between the damage and the evacuation.

" As regards the first part, the documents produced by the Greek agent prove that the Greek forces had grave suspicions of espionage against a member of the staff of Collas & Michel, suspicions of which the French Consulate at Salonika had to recognize the gravity. The expulsion, and the eventual prosecution of this person, were therefore perfectly justified. Does it follow that that incident also justified the evacuation of the whole of the branch office?

" Even if one were inclined to reply to this question in the negative and to hold that Greece is in principle responsible for the consequences of that evacuation, one could not, in the opinion of the Tribunal, admit a causal relationship between the damage caused by the fire, on the one part, and that following on the evacuation, on the other, so as to justify holding Greece herself liable for the disastrous effects of the fire which was, furthermore, in no way caused by the Greek authorities. The damage was neither a forseeable nor a normal consequence of the evacuation, nor attributable to any want of care on the part of Greece. All causal connection is lacking, and in those circumstances Claim No. 19 must be rejected.

" On the other hand, even if one were inclined to reply in the affirmative to the question posed above and, in consequence, to say that the Greek authorities were within their rights in ordering the evacuation, that would in no way amount to excluding all pecuniary responsibility on the part of Greece for the expense which she had thus occasioned to Collas & Michel. From documents produced in these proceedings on the Greek side, it even appears that it was regarded as self evident that Greece would pay the expenses of renting a new office in place of the premises which had had to be evacuated and which she was then able to occupy for her public services. The Tribunal regards this point of view as correct and therefore admits this part of Claim No. 21."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 103.]

NOTE.—See also *Claim No.* 15, relating to the lighthouse on the Isle of Paspargos which the Greek authorities, on April 2, 1915, required Collas & Michel to hand over to them. On October 5, 1916, the lighthouse was destroyed by a bombardment from the Turkish batteries on the coast of Chesmé, Asia Minor. In 1919, the Greek Government had a new lighthouse built at its own expense. In 1928, when the Turkish authorities (to whom Paspargos was awarded under the Peace Treaty of Lausanne of 1923) restored the lighthouse to Collas & Michel, it appeared that the value of the stores and equipment handed back was considerably less than the value of those which had been taken by the Greek authorities in 1915.

The Tribunal said: "As regards the fall in value of the equipment and stores, there is no doubt that Greece committed an irregularity in seizing them in 1915. But the fact that damage occurs subsequently to a wrongful act is not in itself sufficient to create legal liability; there must also exist a causal connection between the act and the damage. Now, the loss caused by the fact that it was impossible for Greece to return the lighthouse to Collas & Michel in its original condition was caused not by the seizure but by the bombardment, which damaged it severely. The bombardment constituted a case of *force majeure*, which would have taken effect even if the lighthouse had remained in the firm's hands, and for which Greece cannot be regarded as responsible. No liability in this regard thus falls on Greece, and the fact that she returned to Collas & Michel equipment and stores of a smaller amount than she received does not place her under a liability to pay compensation." [Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 104.]

State Responsibility—Executive Action—Detention of Foreign Vessels in Time of War—Purpose of Investigation of Officers and Crews—Detention of Finnish Vessels in the United States in 1918—Jurisdiction over Ships in Port.

J. A. ZACHARIASSEN & CO. *ET AL. v.* UNITED STATES.

United States, Court of Claims. June 5, 1956.

THE FACTS.—A number of Finnish vessels had been detained in ports of the United States for varying periods of time between March 18 and November 26, 1918, during which time the United States was at war with Germany and Austria-Hungary. Although the vessels were of Finnish ownership and Finland had declared her independence from Russia in 1917, the vessels were sailing under the Russian flag when they arrived in the United States. The detention of the vessels, which was accomplished through a refusal to grant bunker licences for ship's stores and export cargo licences, was based on (a) the probability of the vessels proceeding through the war danger zone and the possible seizure of the vessels and their cargoes and stores by the enemy, (b) the uncertainty of the political situation in Russia and Finland, and (c) the character and responsibility of the officers and crews of the vessels.

In *J. A. Zachariassen & Co.* v. *United States* (94 Ct.Cl. 315 (1941), *certiorari* denied, 315 U.S. 815, 86 L.Ed. 1213, 62 Sup. Ct. 804 (1942)[1]), the Court of Claims had dismissed a suit for the detention of one of these vessels on the ground that the United States had reasonable cause to delay issuing licences for ship's stores and supplies and that the United States had the right to forbid the exportation of merchandise, even though such a prohibition might prevent vessels from sailing. Eleven similar cases were dismissed by the Court of Claims on this basis in *Erikson* v. *United States* (96 Ct.Cl. 127 (1942)).[2]

A bill to provide compensation for the detention was subsequently introduced in the Congress of the United States. The Senate (82d Congress, First Session) adopted Senate Resolution 34 (98 Cong. Rec. 1290 (1952)) on February 25, 1952. The Resolution provided:

> " *Resolved.* That the bill (S. 334) entitled ' A bill for the relief of the owners of certain Finnish sailing vessels' now pending in the Senate, together with all the accompanying papers, is hereby referred to the Court of Claims; and the court shall proceed with the same in accordance with the provisions of sections 1492 and 2509 of title 28 of the United States Code and report to the Senate, at the earliest practicable date, giving such findings of fact and conclusions thereon as shall be sufficient to inform the Congress of the nature and character of the demand as claims, legal or equitable, against the United States and the amounts, if any, legally or equitably due from the United States to the claimants."

Held: that the Senate must be informed that the plaintiffs had no legal or equitable claims against the United States and that any payment by the Congress would be in the nature of a gratuity. Since reasonable ground existed to suspect the officers and crews of the vessels, the United States was authorized to detain the vessels, notwithstanding the fact that the suspicions were later found to be without foundation. The evidence did not support the contention that the vessels were detained in order to compel the owners to charter the vessels to the United States. The delay in initiating the investigations, which were, once begun, promptly conducted, was not unreasonable under wartime conditions.

The Court said: " . . . For reasons stated in the original *Zachariassen* opinion, which is transmitted to the Senate with this opinion, it is our view that none of the plaintiffs have legal claims against the United States.

" No new evidence on the merits has been presented and the question of defendant's legal liability is *res adjudicata* by reason of the *Zachariassen* case and the related decision, 96 Ct.Cl. 127, dealing with the other claims. However, in a Congressional reference such as this, the court will further consider the equitable side of the claims even though the legal questions have been disposed of previously. *Burkhardt* v. *United States*, 82 F. Supp. 333, 113 Ct.Cl. 115 and 84 F. Supp. 553, 113 Ct.Cl. 658.

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[1] See *Annual Digest*, 1941–1942, Case No. 71.

[2] *Ibid.*, Case No. 71, Note.

" The commissioner of the court in the present proceedings has found that no additional material evidence on the question of liability, either legal or equitable, has been offered by the parties although they have been given full opportunity to do so. After scrutinizing the record we are in agreement with the commissioner's conclusion. Therefore, we have again examined the evidence offered in the earlier proceedings to determine whether the plaintiffs have equitable claims against the defendant of such character as would entitle them to payment of compensation by Congress other than as a gratuity.

" In support of their position that they have equitable claims, (they apparently use ' equity ' in its broadest sense), the plaintiffs contend that the detention of the vessels was due to unfounded suspicions of the officers and crews and that the vessels were actually detained for the purpose of compelling the owners to charter them to the United States.

" While it is true that the suspicions concerning the crews ultimately proved unfounded, it appears that there were reasonable grounds for such suspicions during the period when the vessels were detained. That suspicion had been suggested by the agent of plaintiffs. This country was at war with Germany and her allies. The political situation in Russia at that time was very unstable. Finland had been a part of Russia for many years prior to 1917. It declared its independence from Russia in 1917, but neither the Russian nor Finnish governments had been recognized by the United States at the time the ships were detained. Furthermore, all the vessels were sailing under the Russian flag when they arrived in United States ports. In view of the unsettled political situation, we feel that it was not only reasonable but prudent as well for the United States officials to question the reliability and the political affiliations of the crews since it would have been very detrimental to the United States if the vessels and their cargoes and stores had fallen into the hands of her enemies. Since reasonable grounds for the suspicions existed at the time the vessels were detained, we do not feel that plaintiffs are equitably entitled to recover merely because such suspicions ultimately proved unfounded. The matter of chartering the vessels was primarily for their safety on the voyages and when those negotiations terminated the crews were promptly investigated.

" It is also our opinion that there is no merit in plaintiffs' allegation that the vessels were actually detained for the purpose of *compelling* the owners to charter them to the United States. The evidence does not support this contention. In the special findings of the court in the original *Zachariassen* case the facts and circumstances which formed the basis for withholding the bunker licenses were stated to be (a) the possibility of the seizure of the vessels by the enemy and the appropriation of their cargoes and stores, (b) the uncertainty of the political situation in Russia and Finland and, (c) the character and responsibility of the officers and crews. No new evidence has been presented which would cause the court to reach a different conclusion as to the reasons for the withholding of the licenses which would have enabled the vessels to sail.

" Plaintiffs further urge that they are equitably entitled to recover because of the delay in the investigation of the officers and crews of the vessels. It appears that approximately three months elapsed between the time the matter first came to the attention of the War Trade Board and the time the investigation was conducted and concluded by Naval Intelligence. While such delays are unfortunate, we believe, in the circumstances of these cases, that they are inevitable in time of war, and we cannot accept the view of plaintiffs that the United States is equitably and morally obligated to compensate them for losses caused by such delays unless the delays are clearly unreasonable or without cause. The present case does not, in our opinion, fall within the exception of unreasonableness. A situation which was potentially dangerous to the United States had arisen and the question of how to protect the interests of the Nation as to cargoes and supplies was being carefully considered by various Government agencies. When it was finally decided that an investigation of the loyalty, character and responsibility of the crews should be conducted, it was promptly instituted and concluded. It is our opinion that the mere fact that it was not immediately determined that an investigation of the crews was the proper course of action, does not make the delay unreasonable or without cause. Furthermore, the plaintiffs have failed to establish that they were treated differently than others who suffered delays because of wartime conditions.

" We have carefully considered plaintiffs' other contentions regarding equitable relief and have found them to be without substance. We are, therefore, of the opinion from the record, that in view of all the facts and circumstances, the plaintiffs have no basis for equitable claims against the United States.

" Conclusion

" It is the conclusion of the court that the plaintiffs have no legal or equitable claims against the United States for reasons set out in the findings and the opinion of the court in these cases as well as in the *Zachariassen* case, supra. We further conclude that no amount is legally or equitably due from the United States to the claimants and that any amount or amounts that might be awarded by Congress, in its discretion, to any of the claimants, will be in the nature of a gratuity. . . ."

(Detailed findings of fact by the Court have been omitted.)

[Reports: 136 Ct.Cl. 63, 141 F. Supp. 908.]

State Responsibility—For Negligence of Officials—Right of Alien to Institute Proceedings against Host State—Proceedings in Courts of Host State—Requirement of Reciprocity—Proof of Reciprocity—The Law of Germany.

See p. 379 (*Reciprocity of Legal Remedies* (*Germany*) *Case*).

B—CLAIMS

I.—In General

State Responsibility—Claims—In General—Right of Claimant to Change Legal Basis of Action—Substitution of Claim to Arbitrate under Treaty for Claim Based on General International Law.

See p. 306 (*Ambatielos Claim*), at p. 315.

State Responsibility—Claims—In General—Evidence in Support of—Burden of Proof—Evidence in Possession of Defendant—Relief of Claimant from Requirement of Strict Proof.

See p. 677 (*Lighthouses Arbitration between France and Greece—Claim No.* 6).

State Responsibility—Claims—In General—Evidence in Support of—Burden of Proof—Sharing of Burden of Proof when Evidence Scanty.

See p. 679 (*Lighthouses Arbitration between France and Greece—Claim No.* 14).

C—PRESCRIPTION (EXTINCTIVE PRESCRIPTION)

I.—Before International Tribunals

State Responsibility—Prescription—Extinctive Prescription—Extent of Application of Principle—Absence of Rule Laying Down Time Limit—Allegations of Undue Delay—Relevance to Evidential Requirements.

See p. 306 (*Ambatielos Claim*), at pp. 313 and 314.

State Responsibility—Prescription—Extinctive Prescription—Of Debts—Before International Tribunals—Implied Exclusion by Terms of Arbitration *Compromis*—Exclusion Implied by History of Relation between the Parties.

See p. 659 (*Lighthouses Arbitration between France and Greece*), at pp. 671–672.

D—DAMAGES (MEASURE OF DAMAGES)

II.—Indirect Damage and Damages for Loss of Profits

State Responsibility—Damages—Measure of Damages—Adoption of " Normal Working " Profits as Measure of Compensation for Loss Caused to Concessionaire by Devaluation of Currency.

See p. 342 (*Lighthouses Arbitration between France and Greece—Claim No.* 26).

State Responsibility—Damages—Measure of Damages—Damages for Loss of Profits—Amount of Revenue Lost by Concessionaire on Premature Termination of Concession—Method of Calculation —Currency of Payment—Effect of Devaluation of Currency—Choice of Stable Intermedium for Calculation of Amount Awarded.

See p. 299 (*Lighthouses Arbitration between France and Greece—Claim No.* 27).

E—INTEREST

I.—In General

State Responsibility — Claims — Interest — Interest on Sums Awarded to Parties—Whether Interest Payable—Relevance of Intention of Parties—Refusal to Award Interest for Period Down to Date Fixed for Execution—Award of Interest from Date Fixed for Execution.

See p. 659 (*Lighthouses Arbitration between France and Greece*), at pp. 675–676.

F—MISCELLANEOUS

State Responsibility—Miscellaneous—Unjustified Enrichment.

See p. 780 (*Lighthouses Arbitration between France and Greece—Claim No.* 13).

PART VI

THE INDIVIDUAL IN INTERNATIONAL LAW

A—IN GENERAL

I.—Position of Individuals in International Law. Human Rights and Freedoms

[*See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VII, TREATIES: IX, Operation and Enforcement of Treaties.]

Individual in International Law—Position of—Treaties—Rights of Individuals under—Claims in Municipal Law Based Upon Treaty Obligations—The Law of the United States of America.

FALCON DAM CONSTRUCTORS *ET AL. v.* UNITED STATES.

United States, Court of Claims. July 12, 1956.

THE FACTS.—This was an action against the United States for damages arising from its alleged failure to furnish drawings, materials, and equipment for the construction of the Falcon Dam across the Rio Grande in accordance with the Treaty between the United States and Mexico relating to the Utilization of Water of the Colorado and Tijuana Rivers and of the Rio Grande, signed at Washington on February 3, 1944 (59 Stat. 1219, T.S. No. 994, *U.N.T.S.*, vol. 3, p. 313), and with the contracts concluded with the plaintiffs. The plaintiffs were a joint venture named the Falcon Dam Constructors, consisting of seven United States contractors; a United States corporation, Intercontinent Constructors, Inc., owned by five of the United States contractors; and a Mexican corporation, Constructora Intercontinental, S.A., owned by Intercontinent Constructors and the other two United States contractors.

The Treaty between the United States and Mexico established an International Boundary and Water Commission to construct a series of dams and to apportion the cost and specific items of construction between the two countries. Article 6 of the Treaty provided in part:

> " . . . Each Government agrees to construct, through its Section of the Commission, such works as may be recommended by the Commission and approved by the two Governments. Each Government shall pay the costs of the works constructed by it and the costs of operation and maintenance of the part of the works assigned to it for such purpose."

Article 20 provided:

> "Each Government shall assume responsibility for and shall adjust exclusively in accordance with its own laws all claims arising within its territory in connection with the construction, operation or maintenance of the whole or of any part of the work herein agreed upon, or of any works which may in the execution of this Treaty, be agreed upon in the future."

The International Commission had allocated to the United States the cost and responsibility of making the necessary drawings. Certain materials and equipment were to be furnished by the United States under the contract which it was to make ("Schedule 1"), and others by the United States and Mexico respectively under the contract to be made by Mexico ("Schedule 2"). The contracts let by both countries recited this allocation of responsibility.

The plaintiff Constructora had been formed for the purpose of bidding on the Mexican contract. The complex form of corporate organization had been adopted in order to satisfy the requirement that the Mexican work be undertaken by a Mexican corporation, while at the same time permitting the economies attendant upon the erection of the dam by what was in substance a single group of American contractors. The Mexican contract was awarded to Constructora and the United States contract to the seven plaintiff United States contractors.

The plaintiffs contended that they had been caused damage in the amount of $1,938,777 through failure of the United States to furnish in good season the drawings, materials, and equipment stipulated. They maintained that this was an obligation of the United States both under the terms of the contracts and the Treaty. The defendant moved to dismiss as to the plaintiffs Constructora Intercontinental and Intercontinent Constructors on the ground that they were not parties to the contract with the United States and that the only rights which they possessed were conferred by the contract with Mexico for the Schedule 2 work.

Held: that the motion to dismiss as to the plaintiffs Constructora Intercontinental and Intercontinent Constructors must be granted. The recitals in the United States contracts that certain drawings, materials, and equipment would be furnished by the United States in connection with the Mexican contract was solely for the information of the contractors and was not intended to be a promise for the benefit of the Mexican contractor. The action of Constructora was in essence for the failure of the United States to perform its international obligations to Mexico. The Courts of the United States had, by statute, no jurisdiction to entertain such a claim.

The Court said: "The United States contract, Schedule No. 1, was, of course, made with the United States contractor, the joint venture. The recital in it of the matters of interest to both contractors represented an economy of language, since that much of the writing could simply be duplicated in the two contracts. It also gave each contractor useful information as to what the arrangements inside the Commission were as to the allocation of work and materials not to be furnished by the contractors. The plaintiffs say that these statements amounted to a promise by the United States to the United States contractor, that it would furnish the Schedule 2 drawings and materials to the Mexican contractor, and that this promise was made for the benefit of the Mexican contractor, and gave it enforceable rights against the United States.

" We think that the fact that these recitals were made in the United States contract, and also, presumably, *vice versa*, in the Mexican contract, to which the United States was not a party, was a matter of drafting convenience and that it added no significance to the fact, already known to all parties, that in the international arrangements between the two nations, certain allocations had been made as to which nation was to furnish certain items for the dam. If there was an inclination on the part of the United States plaintiffs and their Mexican subsidiary to count more heavily on the United States furnishing these items on time than they would have counted on Mexico if the items had been allocated to Mexico, that inclination would have existed in any event, since the contractors already knew what the international allocation was.

" We think that the recital in the United States contract of the terms of the international allocation did not amount to a promise to or for the benefit of a third person, not a party to that contract. The 'Special Condition' common to both contracts meant that they should be applied, so far as relevant, to the parties to each contract, 'as the case may be.'

" The plaintiffs also suggest that we, in effect, 'pierce the corporate veil' and treat all of them as one entity and the two contracts as one contract. The whole arrangement, well known to the two governments, whereby the American enterprisers created, for the occasion, a Mexican corporation so controlled by them that the operation could be carried on as a single operation, was rather unreal. But the treaty provisions requiring each country to be responsible for its own, and only for its own, contracts were real enough and must be adhered to.

" Our conclusion is that the plaintiff, Constructora Intercontinental, S.A., which contracted with Mexico, is suing the United States because the United States did not do what it agreed with Mexico to do.

" In 28 U.S.C. § 1502, appears this language:

> 'Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United

States growing out of or dependent upon any treaty entered into with foreign nations.'

"We think Constructora's claim grew out of the treaty with Mexico. The treaty provided for the building of dams such as the Falcon Dam; it created a Commission to administer the building of such dams; it was the entire legal basis for the agreement made by the United States Commissioner that the United States would do the things which were allocated to it to be done. The agreement was the implementation of the treaty. By the statute just quoted, Congress has withdrawn from litigation questions as to whether the United States has done what it agreed by treaty to do. If Mexico were suing on the contractual provisions of the treaty, we would be obliged to so hold and we must likewise so hold as to the plaintiff Constructora."

[Reports: 136 Ct.Cl. 358; 142 F.Supp. 902.]

Individual in International Law—Position of—Rights under International Agreements—Necessity for Municipal Legislation—The Law of Canada.

See p. 459 (*Francis* v. *The Queen*).

Individual in International Law—Position of—Effect of Treaties on Individuals—Treaty Relating to Jurisdiction over Visiting Foreign Armed Forces—Standing of Individual to Claim Rights under—Distinction between Treaties and Agreements—The Law of the United States of America.

See p. 241 (*United States* v. *Copeland et Al.*).

Individual in International Law—In General—Under a Treaty—Construction of Treaty—As Not Creating Rights in a National Against His Own State—Tax Treaty—Contemporaneous Interpretation by One Party.

See p. 489 (*Crerar* v. *Commissioner of Internal Revenue*).

Individual in International Law—Fundamental Human Rights and Freedoms—Universal Declaration of Human Rights, 1948—Freedom of Movement and Residence.

See p. 616 (*Khavkine* v. *Secretary-General of the United Nations*).

Individual in International Law—Fundamental Human Rights and Freedoms—Universal Declaration of Human Rights, 1948.

See p. 393 (*Expulsion of Alien (Germany) Case*).

II.—Before International Tribunals

Individual in International Law—State Acting on Behalf of Commercial Firm in International Arbitration.

See p. 659 (*Lighthouses Arbitration between France and Greece*), at pp. 669–671.

B—NATIONALITY

II.—Acquisition of Nationality. Nationality as Affected by Changes of Sovereignty

Nationality—As Affected by Territorial Changes—Incorporation of Austria into German Reich—Acquisition of German Nationality by Austrian Citizens—Subsequent Severance of Austria from German Reich and Reconstitution of Austrian State—Re-acquisition of Austrian Nationality by Former Austrian Citizens—Whether Re-acquisition of Austrian Nationality Results in Loss of German Nationality—Relevance of Residence at Date of Re-acquisition of Austrian Nationality—Relevance of Person's Intention—The Law of Germany.

AUSTRO-GERMAN EXTRADITION CASE.

German Federal Republic, Federal Supreme Court. January 18, 1956.

THE FACTS.—An Austrian Law of July 10, 1945, provided that all Austrian citizens who had acquired German nationality by virtue of the incorporation of Austria into the German Reich re-acquired their Austrian nationality upon the re-establishment of an independent Austrian State on April 27, 1945. The person whose extradition Austria requested from the Federal Republic of Germany in the present case was an Austrian citizen by origin. He was permanently resident in Germany from some time before the incorporation of Austria into the German Reich (in 1938) until late in 1948, when he again took up residence in Austria. In 1953 and 1954 he committed certain criminal offences in Austria and shortly thereafter he returned to Germany, to take up permanent residence in the territory of the Federal Republic. It was contended that as he was not resident in Austria in 1945, *viz.*, when Austria re-acquired her independence, he had not re-acquired his Austrian nationality in that year, and that he therefore retained his German nationality and was not liable to extradition—the Constitution of the German Federal Republic prohibiting the extradition of German nationals.

Held: that as the accused had returned to Austria to take up residence there after the enactment of the Austrian Law of July 10, 1945, without giving any clear and positive indication that he wished to retain his German nationality, he had lost that nationality and was accordingly liable to extradition.

The Court said: " By virtue of the incorporation of Austria into the German Reich in March 1938—the so-called ' *Anschluss* '—all former Austrian citizens lost their Austrian nationality and acquired German nationality. This is the view previously expressed by the Supreme Court, the Supreme Administrative Court, and the Constitutional Court. It is also the unanimous view of German writers on international law. This view also forms the basis of the Austrian Transitional Nationality Law of July 10, 1945. That Law provides, in Section 1 (1) (*a*), that persons who possessed Austrian nationality on March 13, 1938, again became Austrian nationals as from April 27, 1945, which was the date of the re-establishment of the Austrian State. By virtue of this Law all persons acquired Austrian nationality as from April 27, 1945, who would have been Austrian nationals on that day by virtue of the Austrian Nationality Law which was in force in 1938, if Austria had not been incorporated into the German Reich. This is the position of the accused in the present case. The German nationality which such persons acquired between 1938 and 1945 remains unaffected by Austrian law. According to general principles of international law Austrian law could not encroach upon the German law of nationality or make provision for German nationality. For this reason it does not contain any such provision. The question whether the persons here referred to retained or lost their German nationality has not received any answer in German law or in the law of the Occupying Powers. Nor are there any binding rules of international law governing the question of acquisition and loss of nationality in the event of State succession. It follows that there are no positive rules of law providing that persons who became Austrian nationals as the result of the re-establishment of the Austrian State thereby lost the German nationality which they had acquired by reason of the incorporation of Austria into the Reich.

" We need not decide the question whether the peculiar nature of the re-establishment of the State of Austria provides a legal ground for the assumption that all persons affected by the Austrian Transitional Nationality Law of July 10, 1945, who became Austrian nationals by virtue of that Law, thereby *ipso facto* lost the German nationality which they had acquired by reason of the *Anschluss*, regardless of their place of residence and irrespective of their own will and intention. So far as concerns persons then living in Austria, this may be assumed on the ground of renunciation [or dereliction]. German State power ceased to be exerciseable in Austria not later than the date of the capitulation of the German Reich, which occurred on May 8, 1945. It was the wish of the four Occupying Powers which initially exercised the power of government in Germany that Austria should be re-established as an independent State. When the Federal Republic of Germany came into existence the State of Austria was already in being, and it was recognized by the Federal Republic. The final renunciation of territorial sovereignty over a certain territory necessarily entails the release of the population of that territory from the old bond of nationality. An intention directed solely towards a renunciation of territorial sovereignty, without the release of the population from the old bond of nationality, would be contradictory and would also infringe the principle of international law that nationality can be conferred—and accordingly retained—only on the basis of generally recognized links. These rules are not necessarily applicable to Austrian citizens domiciled in the territory of the German Reich (within the frontiers of the latter as drawn in 1937) on the date when the State of Austria was re-established. However, we need not deal with the question whether all these persons, without exception, lost their German nationality when Austria was severed from the German Reich. Where such persons subsequently returned to Austria to take up permanent residence there, they thereby became part of the residential population released from the German bond of nationality by renunciation [dereliction]. Such renunciation amounts to an option in favour of Austria and the loss of the German nationality acquired by virtue of the *Anschluss*. This legal significance must certainly be attributed to their return [to Austria] if they did not unequivocally express a contrary intention and if from the date of their return to Austria there no longer remained any recognized links with Germany. Having regard to the absence of any positive rules of law governing the matter, there is no reason why in the special circumstances of cases of this kind the unequivocally expressed will of the persons concerned—a will which is expressed by the fact of their return—should not have the effect of resulting in the loss of German nationality. In international law the idea has recently gained recognition that the expressed intention of the person concerned must not be altogether ignored in determining the question of acquisition and loss of nationality. Thus it is not disputed that an alien of full capacity must not be naturalized, nor a de-naturalized person re-naturalized, without his consent. It is the practice, in case of cession of territory, to grant to the inhabitants of the ceded territory an option as to which of the two States they wish to belong to. The Constitutional Court has held that persons who were formerly Czechoslovak nationals and whom Czechoslovakia did not claim as Czechoslovak citizens retained the German nationality which they acquired by compulsory naturalization if from 1945 onwards they consistently expressed their intention of being German nationals. The draft Law for the Clarification of Questions of Austro-German Nationality which the Government submitted to Parliament on February 3, 1955, also takes into account the intention of the persons concerned. It is designed to confer on Austrians who have been permanently resident in the territory of the German Reich—within the frontiers of the latter as at December 31, 1937

—since April 27, 1945, the right to invalidate, by means of a simple declaration with retroactive effect, the loss of their German nationality for which Section 1 [of the Austrian Transitional Nationality Law] provides with effect from April 27, 1945. The other provisions of the draft Law also give wide effect to the intentions of the persons concerned. This is in accordance with the enlightened view which the law takes of the freedom of human personality. It would be inconsistent with this view if individuals were to be treated merely as objects of municipal legislation, of treaties and of the rules of international law."

[Reports: BGH St., 9 (1957), p. 175; NJW, 9 (1956), p. 754.]

Nationality—As Affected by Territorial Changes—Incorporation of Austria into German Reich—Acquisition of German Nationality by Austrian Citizens—Subsequent Severance of Austria from German Reich and Reconstitution of Austrian State—Re-Acquisition of Austrian Nationality by Former Austrian Citizens—Whether Re-Acquisition of Austrian Nationality Results in Loss of German Nationality—Relevance of Residence of Person at Date of Re-Acquisition of Austrian Nationality—The Law of Germany.

In rè FEINER.

German Federal Republic, Federal Supreme Court. January 18, 1956.

In this case, which was concerned with a request by the Austrian authorities for the extradition of a husband and wife who both claimed to be German citizens and as such exempt from extradition by virtue of Article 16 (2) of the Constitution of the German Federal Republic,[1] the Supreme Court approved the following statement:

" A former Austrian citizen who, by virtue of the relevant Austrian statutes enacted since April 27, 1945, again became an Austrian citizen and who, on the dates when these statutes were enacted, was permanently resident in Austria, has lost the German nationality which he acquired by virtue of the (German) Law of March 13, 1938, in conjunction with the (German) Ordinances of July 3, 1938, and June 30, 1939 ".

The Court accordingly *held* that the applicants were liable to extradition.

In giving its reasons, the Court said in part: " The Austrian Transitional Nationality Law of July 10, 1945, provides in Section 1 (1) (*a*) that persons who on March 13, 1938 (*viz.*, the date of the incorporation of Austria into the German Reich), possessed Austrian nationality are again Austrian citizens as from April 27, 1945, the date of the reconstitution of the Austrian State. By virtue of this Law, and with effect from April 27, 1945, all persons acquired

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[1] Article 16 (2) of the Constitution provides that " no German shall be extradited to a foreign country ".

Austrian nationality who on that date would have been Austrian citizens in accordance with the Austrian Nationality Law in force in 1938 if Austria had not been incorporated into the German Reich. This applies to the applicants in this case. The German nationality which such persons acquired between 1938 and 1945 remains unaffected by the Austrian Law [of July 10, 1945]. According to general principles of international law this Austrian Law could not infringe upon the German law of nationality or make any provision in so far as concerns German nationality. For this reason it does not contain any provision to this effect. The question of the retention and loss of German nationality by such persons has not so far been determined by German law nor by the law of the Occupying Powers. Nor are there any binding rules of international law governing acquisition and loss of nationality in cases of State succession. It follows that there are no positive rules of law to the effect that persons who became Austrian citizens as the result of the reconstitution of the Austrian State lost the German nationality which they acquired as the result of the annexation of Austria. So far as concerns this question, there is agreement between the Supreme Court, the Federal Administrative Court and the Federal Constitutional Court. For the reason stated, the Federal Administrative Court considers it feasible—without, however, deciding the question—that persons permanently resident in Austria remain in possession of German nationality until such time as this question is settled by legislation. With regard to those Austrian citizens who were in Germany in 1945 and have remained there without interruption, the Federal Administrative Court is of opinion that they have not lost their German nationality, in the absence of a statutory provision to this effect which would be required in accordance with Article 16 (1) of the Constitution.[1] The Supreme Court has not expressed any views on this question. The Federal Constitutional Court, on the other hand, in its judgment of November 9, 1955,[[2]] reached the conclusion that all persons whom Austria claims as Austrian citizens by virtue of the Austrian Transitional Nationality Law lost their German nationality, without exception, with effect from April 27, 1945, irrespective of their place of residence on that date. The Constitutional Court took the view that the special case of the 'dis-annexation' of Austria resulted in the reintegration of the Austrian people in the Austrian State, and that this reintegration occurred when an independent Austrian State was reconstituted, and that loss of German nationality resulted even in the case of persons who desired to retain their German nationality. According to the view of the Constitutional Court there is no general rule of international law that upon the emergence of States resulting from severance, the population affected thereby must be given the choice between the nationalities of the new and the former State (right of option). In the judgment here referred to the Constitutional Court rejected a constitutional complaint whereby the complainant, who was born in Austria in 1927, contended—as against a Court decision which held that he could be extradited to Austria—that he still possessed German nationality. The judgment of the Constitutional Court is binding on the constitutional organs of the Federal Republic and the *Länder*, as well as on all courts and executive authorities, to the extent that it finds that the complainant's constitutional right under Article 16 (2) of the Constitution was not violated in that case. On the other hand, the general legal principles set out in the judgment are not legally binding, and in the present case this Court must therefore determine the question of nationality independently. We need not deal with the question whether the special nature of the reconstitution of the Austrian State requires us to draw the inference that all persons whom the Austrian Transitional Nationality Law of July 10, 1945, claims as Austrian citizens, irrespective of where they were on that date and irrespective of their own intention in the matter, *ipso jure* lost the German nationality which they acquired as a result of the annexation of Austria. It can be assumed that those of them who were resident in Austria at that time and thereafter—and this applies to the applicants in the present case—did so lose their German nationality by reason of dereliction. German State authority was not, and could not, be exercised in Austria after the capitulation of the German Reich on May 8, 1945. The four Occupying Powers which initially exercised State authority in Germany desired the reconstitution of an independent Austrian State. When the Federal Republic of Germany was established the new Austrian State was in existence, and it was recognized by the Federal Republic. The definitive relinquishment of territorial sovereignty over a territory necessarily includes the release of the population of that territory from the old bond of allegiance. The will merely to relinquish territorial sovereignty, without the will at the same time to release the population from the old bond of allegiance, would be self-contradictory. Moreover, it would violate the principle of international law that nationality can only be conferred and retained on the basis of generally recognized criteria linking it to the country concerned. It follows that the question submitted to the Court must be answered in the sense indicated above."

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[1] This provides that " loss of nationality can only occur by virtue of a statutory enactment . . .".

[[2] See *International Law Reports*, 1955, p. 430 (*sub nom. Austrian Nationality Case*).]

[Report: BGH St., 9 (1957), p. 53.]

Nationality—Acquisition of—By Descent—Illegitimate Child—Nationality of Married Woman—Acquisition of Nationality by Marriage—Effect on Child.

Wurcel *v.* Galace.

Belgium, Tribunal Civil of Brussels. June 9, 1956.

The Facts.—This was an action concerning the custody of a child. The plaintiff, the mother, was at the time of the birth of the child a Polish national, but had subsequently acquired Belgian nationality by marriage. The defendant father was a Roumanian national. The Court was called upon to determine the nationality of the child, so as to be able to apply its national law to the question of custody, in conformity with Belgian rules concerning the conflict of laws.

Held: that the child had Polish nationality. The child was not a Belgian national, having been born of parents who were not Belgian nationals. Under Polish law he had acquired the nationality of the mother, but under Roumanian law he had not acquired the nationality of the father.

The Court said: " If a conflict arises between two nationalities one of which is that of the forum, that nationality must be applied. Nationality laws are public law and embody public policy; these are accordingly binding on all within the territory. If the conflict arises on the territory and before the courts of a third State, the Court must, in the first instance, seek to ascertain which nationality the person concerned seemed, prior to the action, to have adopted. If the person concerned had not expressed any preference, the Court will apply that nationality law the guiding principles of which are most similar to Belgian law.

" Belgian law applies the principle of nationality by descent. . . . A child born more than 300 days after the dissolution of the marriage of his parents [*sic.*] and which is subsequently recognized by his father, nevertheless is deemed to be legally descended from his mother from birth, and to have his mother's nationality. His recognition by the father does not change that nationality. The child in question does not have Belgian nationality seeing that he was born of foreign parents. The fact that his mother subsequently married a Belgian national has not conferred Belgian nationality upon him, seeing that his mother did not acquire that nationality voluntarily.

" A child born of a Polish mother . . . is a Polish national according to the law of that country. . . . On the other hand, the child did not acquire Roumanian nationality as a result of his recognition by his father; this is so, in conformity with Roumanian law, because the mother did not agree to the acquisition of Roumanian nationality by the child. . . ."

[Report: *Pasicrisie Belge*, 1957, III, p. 99.]

Nationality—Acquisition of—By Birth on Foreign Ship in Territorial Waters—The Law of Argentina.

Re DELGADO DE ROMÁN.

Argentina, National Civil Court, Section A. June 21, 1956.

THE FACTS.—The petitioner, Angela M. Delgado de Román, sought to establish her Argentine nationality on the basis of *jus soli*. She stated that she was born in 1911 of Spanish parents aboard a Spanish ship en route to Cadiz while the ship was in the estuary of La Plata. The record indicated some confusion as to the name of the petitioner as later recorded by her parents, which was confounded by the fact that, according to her marriage certificate and the birth certificates of her children, she was born in Spain. The lower Court granted her request. The case came to the National Civil Court on appeal.

Held: that the decision under appeal must be affirmed. A person may acquire Argentine nationality by birth on a foreign ship in Argentine territorial waters.

After reviewing the facts and conflicting testimony, the Court said: " According to Spanish law a person born on board ship takes the nationality of the parents and will be registered in the Civil Registry of the place of domicile of the parents. The captain or the purser of the ship, whether it is a merchant ship or a warship, is required to draw up a birth certificate in duplicate in the presence of the father (or mother) and to transmit one copy either to a Spanish judicial officer or to a Spanish consular representative in the first port which the ship reaches after the event for transmission to the Dirección General de los Registros y del Notariado (see ' Birth on Board Ship ', in *Spanish Encyclopedia*, vol. 23, p. 328). If this law is compared with the law on Spanish nationality and domicile of origin which is now in force, it can be readily concluded that a child born on a Spanish ship of Spanish parents whose place of residence is in a foreign country automatically acquires Spanish nationality under Spanish law and that the birth will be registered at the domicile of origin of the parents. This conclusion explains the Spanish nationality attributed to the petitioner in the various documents which appear in the record. On the other hand, our Law No. 346,[1] which was in force on the date of birth of Angela M.

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[1] *Anales de Legislación Argentina*, 1852–1880, p. 906.

Delgado, resolves the question of her Argentine nationality implicitly: para. 3 of Article 1 provides that a person may acquire Argentine nationality by birth on an Argentine warship and makes no exception for the case of a person born on a merchant ship; para. 5 of this same Article provides that a person may acquire Argentine nationality by birth on an Argentine ship in neutral waters, and while this clause may imply that such nationality might not be acquired by birth on an Argentine ship in foreign territorial waters, there is nothing in it to suggest that a person is to be considered an alien who is born on a foreign ship in Argentine territorial waters.

"In consideration of the body of evidence submitted to the Court in this case, it is ordered that Angela M. Delgado, born on August 2, 1911, on board the Spanish steamship *Barcelona* in the Rio de la Plata, and daughter of Juan Delgado Salvado, son of Mateo Delgado and Carmen Salvado, and of Cándida Leonor González García, daughter of Faustino González and of Antonia García, be duly recorded as having Argentine nationality (Articles 35 and 36 of Law No. 1565).[1] The judgment of the lower Court is affirmed."

[Report: *Revista Jurídica Argentina La Ley*, vol. 84 (October–December 1956), p. 139.]

Nationality—Acquisition of—Officials of United Nations—Prior Waiver of Privileges and Immunities.

See p. 616 (*Khavkine* v. *Secretary-General of the United Nations*).

Nationality—Acquisition of—Nationality as Affected by Changes of Sovereignty—Natives of Dependent Territories—The Philippines—Status as Affected by Philippine Independence Act—Wake Island—The Law of the United States of America.

See pp. 34–35 (*Madrona Banez* v. *Boyd et Al.; Vallejos et Al.* v. *Barber; Petition for Naturalization of Willess*).

Nationality—Acquisition of—By Descent—Illegitimate Child—Acquisition of Nationality by Mother on Marriage—Effect on Nationality of Child.

See p. 370 (*Wurcel* v. *Galace*).

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[1] *Anales de Legislación Argentina*, 1881–1888, p. 153.

V.—Naturalization

Nationality—Naturalization—Non-retroactivity of.

In re SAGAL.

Belgium, Tribunal Civil of Brussels. January 14, 1956.

THE FACTS.—The petitioner, of Polish origin but Belgian by naturalization, sought to obtain the rectification of his first names as set forth in a number of documents concerning his civil status. In conformity with Belgian law these documents reproduced the names as set forth in the birth certificate. It was, however, contended on behalf of the petitioner that the first names included in the birth certificate were not authorized by Belgian law and could accordingly be corrected.

Held: that the petition must be dismissed. Polish law was applicable to the birth certificate. The subsequent naturalization of the petitioner did not have retroactive effect.

The Court said: " The birth certificate was drawn up in Poland. Accordingly, Belgian law did not apply to it. . . . It is not suggested that the petitioner's first names were given him in violation of the law of the place where the birth certificate was issued, or of the law of his nationality at the time of its establishment. . . . The naturalization which was granted to the petitioner has no retroactive effect, and cannot accordingly make a birth certificate which had previously been regularly drawn up subject to rectification."

[Report: *Pasicrisie Belge*, 1957, II, p. 76.]

Nationality—Naturalization—Eligibility for—" Treaty Merchants" —Treaty Inconsistent with Subsequently Enacted Statute—The Law of the United States of America.

See p. 453 (*Hing Lowe* v. *United States*).

Naturalization—Requirement of Continuous Residence Therefor —Trust Territory of the Pacific Islands—Whether " Residence in the United States ".

See p. 35 (*Application of Reyes*).

IX.—Nationality of Married Women

Nationality —Of Married Women—Acquisition of Nationality by Marriage—Effect on Child.

See p. 370 (*Wurcel* v. *Galace*).

C—ALIENS

I.—Admission of Aliens

Aliens—Admission of—Illegal Entry—Distinguished from Unlawful Prolongation of Stay—Indian Passport Act and Rules—Foreigners Act, 1946.

The State *v.* Ibrahim Adam.

India, High Court of Bombay. February 14, 1956.

(Gajendragadkar and Gokhale JJ.)

The Facts.—The respondent, a Pakistan national, came in 1954 on a visit to India. After his visa expired he was asked to leave India but refused to do so and stayed on. He was arrested and brought to court for violation of the Indian Passport Rules. He contended that his overstay in India beyond the period permitted by the passport authorities did not amount to a contravention of Rule 3 and was not punishable under Rule 6 (*a*) of the Indian Passport Rules. The trial Magistrates gave judgment in his favour and the case came on appeal to the High Court. The appellant State argued that the decision of the Magistrate was based on a misconstruction of the Indian Passport Rules and maintained that the accused respondent was guilty of illegal entry into India.

Held: that the appeal must be dismissed. Illegal entry and continuous residence by overstaying in India were two different matters. The Passport Rules provided for the punishment of aliens in case of illegal entry, not in case of overstaying. In the latter case the Government could take action under the Foreigners Act, 1946, which covered its right to expel aliens, limited by considerations of a moral nature only.[1]

The Court said: " In considering the scope of the Passport Rules it would be relevant and useful to refer to the preamble to the Foreigners Act (Act 31 of 1946). This Act has been passed by the Indian Legislature because it was thought expedient ' to provide for the exercise by the Central Government of certain powers in respect of the entry of foreigners into India, their presence therein and their departure therefrom.' [Section 3 of the Foreigners Act] tends to show that in the case of a foreigner who has entered India on a valid passport but continues to stay in India beyond the period permitted by his visa, it would be open to the Central Government to take action. . . . If this be the true position, it cannot be said that the Central Government would be powerless to deal with a foreigner, like the respondent, who has overstayed in India. . . . Rule 3 (Passport Rules, 1951), with which we are concerned, does not refer to the residence or continued residence of a foreigner, and Rule 6 (2) cannot therefore be said to apply to a foreigner merely because he has stayed in India beyond the period allowed by his visa. Entry into the country and residence in the country are in our opinion two different acts, and rules regulating the first set of acts cannot by themselves purport to govern the second set of acts unless appropriate words are used in the rule itself.

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[1] The Court referred to *Karimun Nisa* v. *The State* (A.I.R. 1955 Nagpur 6), noted at the end of the present report.

" As soon as a foreigner enters India, the act of entry has been completed; his presence in India, however unauthorized it may be, cannot be said to amount to an entry into India from the moment his residence becomes illegal. Entry into a country is a physical act and once the act is accomplished and the foreigner has planted himself in India, it cannot be said even symbolically that after the period prescribed by the visa had expired he must be deemed to have gone back to his own country and entered this country unauthorizedly thereafter. We think it would be unreasonable to adopt any such fiction [in order] to be able to invoke Rule 6 (*a*) against the respondent in the present case."

[Report: A.I.R. 1956 Bombay 593.]

NOTE.—Similar decisions were given by the High Court of Madhya Bharat in *The State* v. *Hamid Khan* (A.I.R. 1956 M B 239) and by the High Court of Allahabad in *Chhanga Khan* v. *The State* (A.I.R. 1956 Allahabad 69).

See also *Karimun Nisa* v. *The State* (A.I.R. 1955 Nagpur 6), where a lady who was by birth a citizen of India but acquired Pakistan citizenship by marriage and lived with her husband in Pakistan, came back to India after his death and applied for permission to reside in India. The Government refused to grant permission, and the Court upheld the refusal as she was an alien and the Government had discretion to expel her. The Court remarked at the conclusion of its judgment: " We regret . . . that we cannot help the petitioner. We can only emphasize for the consideration of the authorities concerned that this is a hard and unfortunate case where a young and helpless woman is suffering for the act of another and deserves to be treated with that sympathy which is characteristic of the best traditions of Indian chivalry. This country has never been known to refuse an ' asylum ' to any person who driven by circumstances supplicated her protection. The case of a helpless widow who has young children to maintain and cannot live an independent existence without the support of her relatives in India, deserves all the greater consideration."

Aliens—Admission of—Alien Entering Unlawfully—Purging of Initial Disability—The Law of Argentina.

See p. 395 (*Re Sosa*).

II.—Position of Aliens

iii.—Treatment by and Responsibilities of the Receiving State

[*See also* PART V, STATE RESPONSIBILITY.]

Aliens—Treatment of—Right to Engage in Trade—Reciprocal Treatment Granted by Treaty—Franco-Swiss Treaty of February 23, 1882—Whether Trader's Permit Required by Swiss Citizen in France—Interpretation of Treaty by Judiciary or Executive—The Law of France.

Re SASTELLA.

France, Court of Cassation. May 25, 1956.

THE FACTS.—By virtue of the Franco-Swiss Treaty of February 23, 1882, " French citizens shall be entitled to engage in industry and commerce in the same way as Swiss citizens . . . and Swiss citizens in France shall enjoy the same rights and benefits." A French Decree of November 12, 1938, provided that all foreign traders in France must be in possession of a special trader's permit. The Court of Appeal of Paris held that by virtue of the Treaty a Swiss citizen was entitled to engage in trade in France without being in possession of a trader's permit.

On further appeal,

Held: that a decision on the merits, *viz.*, as to whether Sastella was entitled to engage in trade without a trader's permit, should have been adjourned until the Minister for Foreign Affairs had given his views on the following questions: (i) whether according to the true interpretation of the Treaty a Swiss citizen was entitled to engage in trade in France without a trader's permit, and (ii) whether a French citizen in Switzerland would be entitled to engage in trade in Switzerland without a trader's permit. The case was accordingly referred to the Court of Appeal of Orléans to take the requisite steps to ascertain the views of the Minister for Foreign Affairs on these two questions.

The Court said: " The criminal courts are under a duty to suspend a decision on the merits where that decision depends on the determination of a prior question. Sastella, a Swiss citizen, was prosecuted for having engaged in trade in France without being in possession of a special identity card bearing the word ' trader ' and issued by the administrative authorities, an offence punishable by the Decree of November 12, 1938. The Court of Appeal [of Paris], in order to justify an acquittal—notwithstanding that the facts alleged against the accused were not disputed—referred to the Franco-Swiss Treaty of February 23, 1882, which provides in Articles 1 and 3 that

> ' . . . any industrial and commercial activity to which Swiss citizens are entitled shall equally be open to French citizens, without any

> pecuniary or otherwise more onerous condition being permissible, [and that] Swiss citizens in France shall be entitled to the same rights and privileges'.

The trial Judges inferred from this that by virtue of the Treaty, which cannot be derogated from by a municipal law, Swiss citizens are put on the same basis as our citizens in so far as concerns the free exercise of an industrial or commercial activity in France. It was necessary to ascertain: (1) whether the scope of the said Treaty is such as to permit Swiss citizens to engage in trade in France without being in possession of a special permit such as is required for all foreign traders; and (2) whether French citizens residing in Switzerland enjoy the right, by virtue of reciprocity, to engage freely in trade without a permit. Before determining the merits of the prosecution the trial Judges should have asked the Minister for Foreign Affairs to give his views on these two questions, which have not yet been the subject of interpretation between the Contracting Parties. Accordingly, the Court of Appeal, in dealing with the merits without first having obtained a decision of the competent authority on these prior questions, exceeded its powers, and the decision must be quashed."

Reports: *Bulletin de la Cour de Cassation*, 1956, p. 718; *Jurisclasseur périodique*, 1956, IV, p. 97; *Journal de Droit international*, 1957, p. 134 (with Note by Sialelli).

NOTE.—See also *Re Padilla* (*Bulletin de la Cour de Cassation*, 1956, p. 1049), the case of a Spanish citizen, in which the Court of Cassation, by judgment dated July 25, 1956, *held* that a question of this kind must be submitted to "the Government", and that the courts were not entitled to rely on the views expressed by the Head of the Department of Administrative and Social Affairs of the Ministry for Foreign Affairs. See further, to the same effect the judgment of the Court of Cassation of October 3, 1956, in *Re Tropeano-Giacomello* (*ibid.*, p. 1076), which was concerned with an Italian citizen.

In *Re Villa* (*Recueil du Conseil d'Etat*, 1956, p. 433), the Conseil d'Etat, by judgment dated November 16, 1956, *held* that Italian citizens were not exempt from the requirement of holding a trader's permit, notwithstanding that they were entitled to most-favoured-nation treatment in France. The Court referred to the view expressed by the Ministry for Foreign Affairs that the benefit of such treatment "cannot be interpreted as authorizing foreign nationals to engage in trade . . . without the authority required by the Decree of November 12, 1938."

Aliens—Position of—Right of Residence—The Law of Germany.

RESIDENCE OF ALIEN (GERMANY) CASE.

German Federal Republic, Federal Administrative Supreme Court.
April 10, 1956.

THE FACTS.—The plaintiff, a foreign national, applied for a permit to reside in the German Federal Republic, which application was refused. On appeal, he contended that as an alien he had a right to be granted a residence permit.

Held: that an alien unable to rely on the special provisions of the Refugees Convention of July 28, 1951, or to invoke the right of asylum guaranteed by the German Constitution to politically persecuted persons, was not entitled to claim the right to reside in Germany.

The Court said: "The lower Court rightly proceeded on the basis that the plaintiff has no right to claim a residence permit. It must be conceded that the legal position in this respect is not the same as before 1945 when no alien could claim such a right, because in the meantime certain provisions have been enacted which under certain conditions give a right of residence to aliens. Thus, Article 16 of the Constitution gives the right of asylum to politically persecuted persons. This right also exists by virtue of the Law concerning the Legal Status of Homeless Aliens, dated April 25, 1951. Similarly, the Geneva Convention of July 28, 1951, relating to the Status of Refugees gives a right of residence to certain categories of people. These provisions, however, do not apply to the present case. The plaintiff is neither a political refugee within the meaning of Article 16 of the Constitution, nor does he fall within the ambit of the provisions relating to refugees. The Aliens Police Ordinance of August 22, 1938, alone applies to him. This Ordinance does not confer a right to a residence permit. In its judgment of December 15, 1955, this Senate held that the making of an order prohibiting residence in pursuance of the Ordinance is within the discretion of the competent authority. The same applies to the granting of a residence permit in accordance with the provisions of the Ordinance. It is true that Section 1 of the Ordinance provides that the right of residence 'is' granted to those aliens whose personality and the purpose of whose sojourn provide a guarantee that they are worthy of the hospitality granted to them, but the use of the word 'is' does not imply that the Ordinance was intended to confer an enforceable right on those aliens who satisfy these requirements. Section 1 of the Ordinance is no more than a directive governing the decision which is to be made in the discretion of the competent authority. That this decision is within the discretion of the authority follows in particular from Section 3 of the Ordinance, which gives a right to the authority to restrict, without any limitation on the exercise of its power, both territorially and as to the period of its validity, a residence permit previously granted. This provision proceeds on the basis that an alien has no enforceable claim to a residence permit by virtue of the Ordinance. The plaintiff cannot rely on the Constitution to displace this provision. The extent to which the Constitution intended to provide constitutional protection for the right of domicile and residence—apart from the right of political asylum which does not apply in this case—is to be inferred from Article 11 thereof. This Article grants such a right to Germans, but not to aliens. In view of this the plaintiff cannot rely on Article 2 of the Constitution (which provides for certain rights to be enjoyed by ' everybody '). The rule of equality contained in Article 3 of the Constitution cannot lead to a different result. That Article does not preclude the Legislature from differentiating between aliens and Germans. Nor can the plaintiff rely on international law. Although the general rules of international law have become part of federal law, in accordance with Article 25 of the Constitution, there is no rule of international law which gives aliens the same right of residence as citizens. The (European) Convention of November 4, 1950, for the Protection of Human Rights and Fundamental Freedoms grants to aliens general rights of freedom and the development of their personality but not a general right of residence and economic activity. The lower Court rightly confined itself to the question whether the administrative authority acted within the framework of its discretion. The limits of this discretion are narrower than before 1945, and new limits result from those fundamental rights which apply to all human beings and not only to Germans. Further limits in individual cases may well result from the European Convention for the Protection of Human Rights and Fundamental Freedoms, but within the framework of these limits the administrative authority must still decide according to its discretion whether a residence permit is to be granted in any particular case. The findings of fact of the lower Court do not indicate that these limits have been disregarded."

[Report: B Verw GE, vol. 3, p. 235.]

Aliens—Position of—Right of Alien to Institute Proceedings in Courts of Host State—Action for Negligence of Officials of Host State—Requirement of Reciprocity—Proof of Reciprocity—The Law of Germany.

RECIPROCITY OF LEGAL REMEDIES (GERMANY) CASE.

German Federal Republic, Federal Supreme Court. October 1, 1956.

THE FACTS.—The plaintiff, a Belgian national, brought an action against a German *Land* for an injury sustained by reason of the negligence of a civil servant in the performance of his official duties. The relevant German Law provided that foreign nationals were entitled to bring such actions only in cases where reciprocity was guaranteed by the municipal law of the plaintiff's home State or by a duly promulgated treaty between that State and Germany. The plaintiff contended that the guarantee of reciprocity could be proved by adducing evidence that the practice of Belgian courts was such as to allow an action to be brought by a German national in Belgium in similar circumstances, and that there was no need for him to prove the existence of a Belgian law or a treaty between Belgium and Germany expressly providing for reciprocity.

Held: (i) that the plaintiff's contention must be rejected, and that only proof of the existence of a Belgian law or a duly promulgated treaty between the two countries expressly providing for reciprocity would entitle the plaintiff to sue the German *Land*; and (ii) that as there was no Belgian law and no treaty between the two countries expressly guaranteeing reciprocity, the action must be dismissed.

The Court said: " The (plaintiff's) appeal contends that just as it is sufficient, in the case of recognition of foreign judgments, to satisfy the requirements of reciprocity by proving a State practice to that effect, so it must be sufficient in this case to prove that reciprocity is accorded in actual practice. The appellant accordingly says that the lower Court ought to have acceded to his request to seek information from the Belgian Consulate-General as to the actual Belgian practice in this matter. This is not correct. To begin with, we may say that the laws on State liability which are here in issue are still in force. The doubts which have been expressed with regard to this are ill-founded. The provision that the State is liable for its officials, at the suit of an alien, only in cases where reciprocity is guaranteed does not conflict with the principle of equality postulated in Article 3 of the Constitution.[1] This principle does not require complete equality between Germans and foreign nationals in municipal law. In providing for differential treatment of Germans and aliens in the matter here in issue—which accords with the traditional custom of international law—the law does not make different provisions for identical sets of facts. On the contrary, it provides for different sets of facts. For this reason the application of this provision does not result in an injustice to, or the unequal treatment of, foreign nationals within the meaning of Article II of Control Council Law No. 1.

" Contrary to the contention put forward in the appeal to the effect that the legal principles governing the interpretation of section 328 (1) (v) of the Code of Civil Procedure must be applied,[2] we are of opinion that the wording of the Law here in issue precludes any such interpretation. Section 328 of the Code of Civil Procedure merely requires that reciprocity shall be guaranteed, without making any provision as to the manner in which it shall be so guaranteed. The Law here in issue, on the other hand, provides expressly that reciprocity must be guaranteed either by the legislation of the foreign State concerned or by a treaty which has been duly published.

[1] This Article provides, as far as here material, that " all men are equal before the law ".

[2] This part of the section provides as follows: " The recognition of the judgment of a foreign court is not permissible unless there is a guarantee of reciprocity."

For this reason nothing can be inferred, in so far as concerns the question of reciprocity within the meaning of the Law here in issue, from the fact that a constant practice of granting reciprocity suffices within the framework of section 328 of the Code of Civil Procedure. So far as concerns the Law here in issue, reciprocity becomes relevant only when guaranteed as there provided and confirmed by promulgation. The lower Court was therefore right in treating as irrelevant the request of the plaintiff to be allowed to adduce proof of an alleged practice granting reciprocity. The plaintiff's claim against the defendant *Land* therefore meets with the obstacle that reciprocity in Belgium is not guaranteed in the manner required by the Law here in issue."

[Report: NJW, 9 (1956), p. 1836.]

Aliens—Treatment of—Right to Free Legal Aid—Non-resident Aliens—The Law of the Dominican Republic.

Re BOILEAU.

Dominican Republic, Supreme Court. February 3, 1956.

THE FACTS.—Boileau, a French national resident in Guadaloupe (French West Indies), applied for free legal aid and for the appointment by the court of a lawyer to represent him in an appeal against a decision of the Court of Appeals of Ciudad Trujillo (Dominican Republic). Legal aid in civil and commercial matters is available under the provisions of section (d) of Article 78 of the Law on Judicial Organization to " paupers, under oath, or to [others who], by reason of inadequate resources, find it impossible to exercise their rights to justice, either as defendants or plaintiffs ", and such assistance " shall be granted in civil and commercial cases if, from examination of the case and the resources of the petitioner, the Judge, tribunal or court shall consider it applicable ".

Held: that the application must be dismissed. As a non-resident alien, the petitioner was not entitled to legal aid.

The Court said: " It is a principle that the benefit of legal aid should be granted to all Dominicans, whatever may be their domicile, and whether physical or corporate persons, who prove that they fulfil the conditions specified by law and who have observed the formalities required thereby. It likewise may be granted to aliens who are domiciled in the Dominican Republic or to those who may be accorded this benefit by virtue of binding international conventions, but never to aliens not domiciled in the country and who have not, moreover, fulfilled the requirements established in our laws for the granting of judicial assistance.

"The petitioner, Harold Boileau, is an alien resident outside of this country, he is not domiciled in the Dominican Republic, and, in addition, there is no binding international convention of which he can take advantage. He is therefore not in a position to request the benefit of judicial assistance. . . ."

[Report: *Boletin Judicial*, No. 547 (February 1956), p. 387.]

Aliens—Position of—Treatment by Receiving State—Refugees—Refugee within Meaning of Geneva Convention of July 28, 1951—" Volksdeutsche " from Yugoslavia—Whether Entitled to Status of Refugee Notwithstanding Yugoslav Nationality—Status in Austria—Competence of Austrian Courts in Divorce Proceedings—The Law of Austria.

YUGOSLAV REFUGEE (AUSTRIA) CASE.

Austria, Supreme Court. April 4, 1956.

THE FACTS.—The petitioner, a so-called "*Volksdeutscher*", was domiciled in Yugoslavia when the German armed forces invaded that country in 1941. He was registered as a German national by the German authorities and issued with a German army identity card. After the war he was arrested by the Yugoslav authorities as a so-called "collaborator". Shortly thereafter he was released, and in 1946 he took up residence in Austria. Some years later he instituted divorce proceedings against his wife in the Austrian courts. According to Austrian law, the Austrian courts were competent to exercise jurisdiction in divorce proceedings where, as far as here material, the husband was a stateless person. The Court of first instance made enquiries in Yugoslavia and was informed that the petitioner was still a citizen of Yugoslavia. It took the view that his status as a Yugoslav citizen was incompatible with his contention that he was a stateless person, and accordingly held that it was not entitled to exercise jurisdiction.

On appeal, it was held that the petitioner was a refugee within the meaning of the Geneva Convention of July 28, 1951, relating to the Status of Refugees, and that in accordance with Article 12 of the Convention his personal status was governed by Austrian law, Austria being the country of his domicile (or residence). It was further held that as a refugee he was no less entitled to invoke the jurisdiction of the Austrian courts than if he had been a stateless person. The respondent appealed to the Supreme Court.

Held: that the appeal must be dismissed. Refugees within the meaning of the Convention who were domiciled or resident in Austria were as much entitled to invoke the jurisdiction of the Austrian courts as Austrian citizens.

The Court said: "The Convention, which, as a duly published

Treaty, has the same effect as municipal law so far as concerns its binding force for all municipal authorities and individual citizens (Articles 49 and 50 of the Constitution), provides in Article 12 that the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence. The personal status of refugees, in accordance with the provision here referred to, is governed by the law of the country of domicile or of residence, and not by the law of the nationality of the refugee. All rules of the conflict of laws applicable in the countries which are parties to the Convention therefore have to yield to the relevant provision of the Convention in all matters concerning the personal status of the refugee. The relevant provision of Austrian law governing the personal status of the refugee therefore includes the competence of the Austrian courts, because a refugee who in matters of personal status has the same rights as an Austrian citizen can claim the same *forum* as an Austrian citizen. The petitioner can claim the competence of the Austrian courts, without being required to satisfy the condition that the judgment of an Austrian court is entitled to recognition according to the law of his nationality. It would be contrary to the spirit and purpose of the Convention if—although in matters of personal status the law of the country of domicile (or residence) takes the place of the law of nationality, which curtails the rights of a refugee—no Austrian *forum* were available in the present case.

"Lastly, it can be inferred from Article 16 (1) and (2) of the Convention that access to the Austrian courts must not be denied, not only because the petitioner is a refugee, but also notwithstanding that he still has a foreign nationality."[1]

[Report: JB, 1956, p. 592.]

NOTE.—See also the judgment of the Austrian Supreme Court of March 21, 1956, reported in JB, 1956, p. 591.

Aliens—Treatment of—Status of Refugees within Meaning of Geneva Convention of July 28, 1951—Right of Residence—Freedom of Movement in Country of Residence—The Law of Germany.

RESIDENCE OF REFUGEE (GERMANY) CASE.

German Federal Republic, Supreme Federal Administrative Court.

January 12, 1956.

THE FACTS.—Section 12 of the German Law on the Legal Status of Homeless Aliens, which was enacted to implement the relevant provisions of the Geneva Convention of July 28, 1951, relating to the Status of Refugees, provides that so-called " homeless aliens " are entitled to equality of treatment with German nationals in the choice of their residence within the territory of the Federal Republic of Germany. A circular of the Federal Ministry of the Interior, however, advised the local authorities of the Federal Republic that such aliens were required to obtain residence permits in the same manner as other aliens. The plaintiff, a Latvian national by origin, took up residence in the Federal Republic of Germany in 1945. She was recognized as a " homeless alien " within the meaning of the above-quoted Law, and in 1952, having moved from one district of the Federal Republic to another, she informed the competent authority of the latter of her presence. She was then asked to produce her identity card in order that a residence permit might be entered therein. She objected to the entry of such permit on the ground that she was not required to obtain a residence permit.

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[1] Article 16 of the Convention provides as follows:

"1. A refugee shall have free access to the courts of law on the territory of all Contracting States."

"2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*."

Held: (i) that " homeless aliens " as defined by law (of whom the plaintiff was one) were not required to obtain a residence permit; and (ii) that notwithstanding that the plaintiff did not require a residence permit, the action must be dismissed because the contested entry was merely intended to confirm the plaintiff's privileged status, and did not imply any derogation from her rights as a " homeless alien ".

The Court said: " This Court does not share the view of the Federal Minister of the Interior that homeless aliens within the meaning of the Law on the Legal Status of Homeless Aliens (hereinafter referred to as ' the Law ') require a special residence permit in accordance with the provisions of the Aliens Police Ordinance. This view cannot be supported by the wording or the spirit of the Law. According to Section 12 of the Law, homeless aliens, *viz.*, aliens who satisfy the requirements of Sections 1 and 2 of the Law, enjoy equality of status with German nationals in the choice of their residence in the territory of the Federal Republic. Apart from certain exceptions applicable to Berlin, German nationals do not require a permit when choosing their place of residence. According to the express provision of Section 12 of the Law, homeless aliens have the same right [of taking up residence where they wish]. The equality of status with German nationals which had been granted to homeless aliens is subject only to the requirements of Sections 1 and 2 of the Law, and not to the further requirements of a residence permit. Those who take the view that homeless aliens require a special residence permit rely on the history of Section 12 of the Law. It is true that the Law was intended to confer on homeless aliens the rights provided for in the Refugees Convention at a time when that Convention was still under discussion, and long before that Convention came into force, but Article 26 of the . . . Convention—

which is here relevant—differs considerably from Section 12 of the Law. According to Article 26, every Contracting Party grants to refugees lawfully in its territory the right to choose a place of residence and to move about freely, subject to any regulations applicable to aliens generally in the same circumstances. Article 12 of the Law contains no such exception. This difference in the wording of Article 26 of the Geneva Convention and Section 12 of the Law is fully intelligible. As the Court below rightly says, the difference is due to the special position of homeless aliens in the Federal Republic. These homeless aliens came to Germany as a result of Hitler's policy and the war. They cannot easily return to their countries of origin. It is therefore quite natural that it was intended, when recognizing them as homeless aliens, to give them the right to take up residence in the Federal Republic. Such right follows from their recognition as homeless aliens, which is to be determined solely in accordance with Sections 1 and 2 of the Law. Section 23 of the Law does not affect the position. According to Section 23, homeless aliens may be expelled for reasons of public security and order. Thus their right to reside in the Federal Republic, which is conferred on them *quâ* homeless aliens, can subsequently be taken away from them. The competent authority is, of course, always entitled to inquire whether the conditions of Section 23 are present, but until their expulsion under Section 23, homeless aliens have the right of residence by virtue of the direct application of the Law, and not by virtue of a special administrative act. Notwithstanding that, in accordance with the foregoing, the view of the Federal Minister of the Interior that homeless aliens require a residence permit in accordance with the Aliens Police Ordinance must be rejected, the appeal is not well-founded because the action does not disclose an interest which requires protection. The plaintiff's travel document is merely intended to confirm that the plaintiff has the legal status of a homeless alien and that by virtue of that status she has the right to reside in the Federal Republic. It must be left to the competent authorities to make it clear by means of a special entry that the holder of the document has the right to reside in the Federal Republic. As a rule, this will accord with the interests of the homeless alien, by facilitating the assertion of his rights in Germany."

[Report: NJW, 9 (1956), p. 964.]

Aliens—Position of—Status of Refugees within Meaning of Refugees Convention of July 28, 1951—Yugoslav Refugee in German Federal Republic—Order for Expulsion—Limits of Order According to German Law of April 25, 1951, Concerning " Homeless Aliens "—The Law of Germany.

YUGOSLAV REFUGEE (GERMANY) CASE.

German Federal Republic, Federal Administrative Supreme Court.

June 28, 1956.

THE FACTS.—The plaintiff was of Yugoslav origin and a " homeless alien " within the meaning of the German Law of April 25, 1951, concerning the Legal Status of Homeless Aliens. This Law was enacted in the German Federal Republic prior to the conclusion of the Geneva Convention of July 28, 1951, relating to the Status of Refugees, and its purpose was to give effect to that Convention which was then already known in outline. The German authorities made an order that the plaintiff " was to leave the territory of the Federal Republic within two months ". The order was made on the ground that the plaintiff had a number of convictions which made it desirable that he should no longer be allowed to reside in the German Federal Republic. The plaintiff contended, *inter alia*, that the order was contrary to Section 23 of the Law of April 25, 1951, in that it left it open to the German authorities to deport him to Yugoslavia where his life was in danger, and he accordingly asked for the order to be rescinded.[1]

Held: that the order must be rescinded in so far as it was capable of constituting the basis of the plaintiff's expulsion to Yugoslavia or another country of the " Eastern Bloc ", and that the case must be remitted to the lower Court for a fresh hearing in the light of the present decision.

The Court said: " As this Senate has previously pointed out,[2] homeless aliens have the right by law to reside in the Federal Republic, without requiring a special permit. This right can only be limited in accordance with Section 23 of the Law of April 25, 1951. This Section lays down the conditions under which a homeless alien may be expelled, *i.e.*, deprived of his right to reside in the Federal Republic. In this case the expulsion has been ordered in the form of a prohibition to reside in the Federal Republic, in accordance with the provisions of the Aliens Police Ordinance. The decisive question in this case is whether this prohibition is in conformity with Section 23 of the Law of April 25, 1951. In addition to Section 23 the plaintiff also relies on Articles 32 and 33 of the International Convention relating to the Status of Refugees (Geneva Convention) of July 28, 1951. The Court need not determine whether the plaintiff falls within the ambit of the Geneva Convention. Even were this to be the case, the question to be determined would have to be decided in accordance with Section 23, and not in accordance with the provisions of the Geneva Convention. According to Article 5 of the Geneva Convention all other rights and privileges which are granted independently of the Covention remain unaffected. More extensive rights that may exist are therefore to remain vested in the persons concerned. This applies in particular to the rights of homeless aliens resulting from the Law of April 25, 1951, because the Legislature took into account the protective provisions of the Geneva Convention which was then in process of preparation and which it regarded as containing the minimum requirements of the protection to be granted to homeless aliens. The Legislature, more particularly, granted to homeless aliens a more extensive protection than the Geneva Convention, by virtue of Section 23 of the Law. Section 23, as well as Articles 32 and 33 of the Geneva Convention, do not permit the expulsion or extradition of a refugee (homeless alien) to a country in which his life or liberty are in danger by reason of his race, antecedents, origin, faith or religious or political beliefs. According to Article 33 (2) of the Geneva Convention, however, the benefit of this privilege may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. This exception to the protective provision is unknown to Section 23 of the Law of April 25, 1951. This Law grants protection against expulsion and extradition to the countries referred to without any exception. It follows that Section 23 is the relevant provision to be applied in each case, because it is the more extensive provision granting protection."

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[1] The relevant part of Section 23 reads as follows: " A homeless alien shall not be extradited, expelled, deported or sent back to a country in which his life or liberty is in danger by reason of his race, antecedents, origin, faith or religious or political beliefs."

[2] *Cf.* a judgment dated January 12, 1956: NJW, 9 (1956), p. 364.

The Court then dealt with, and rejected, the view of the lower Court that the substantive provisions of the Aliens Police Ordinance of August 22, 1938, were applicable to the case of a homeless alien. In the opinion of the Court the *lex specialis* of April 25, 1951, applied, and the general Ordinance was applicable only in so far as concerned the procedure to be followed by the administrative authorities. The Court continued:

" According to Article 23 of the Law of April 25, 1951, a homeless alien can be expelled only for reasons of public order and security. In interpreting these terms we must remember that the Law was intended not only to solve a German problem but also an international problem, and that it was intended to give advance affect to the protective provisions of the Geneva Convention for the group of homeless aliens. In interpreting these terms we must therefore go back to the Geneva Convention. It follows that 'public order and security' within the meaning of Section 23 correspond to the terms 'national security and public order' in Article 32 of the Geneva Convention. These are the terms which must guide us. The expulsion must constitute a suitable measure—justified from the point of view of proportionality—to secure the preservation and restoration of public order and security within the meaning referred to above. It is immaterial, therefore, whether these terms are the equivalent of the corresponding terms used in the police law of the country concerned. This question, however, need not be determined because in the result we accept the view of the lower Court in so far as it justifies the expulsion of a homeless alien who has previous convictions and of whom it may be expected with a high degree of probability that he will again commit criminal offences."

The Court then dealt with the contention of the plaintiff that a period of two months within which to leave the Federal German Republic was inadequate and held that, as the plaintiff must have expected an expulsion order in view of his previous convictions, an order to leave Germany within two months was reasonable. The Court continued:

" Having regard to Section 23 of the Law of April 25, 1951, the order must be partially rescinded. This Section provides that the plaintiff must not be expelled, deported or sent back to countries in which his liberty is [likely to be] endangered by reason of his political beliefs. The question whether this provision applies in the present case has not yet been examined. It should have been examined. It should have been examined with regard to Yugoslavia and the countries of the Eastern Bloc. . . . For these reasons the judgments of the lower Courts and the expulsion order must be rescinded in so far as the prohibition to reside in the Federal Republic forms the basis of a compulsory expulsion of the plaintiff to Yugoslavia and the countries of the Eastern Bloc. The case is remitted for further hearing to the lower Court."

[Report: NJW, 10 (1957), p. 762.]

Aliens—Position of—Status of Refugees within Meaning of Refugees Convention of July 28, 1951—Divorce Proceedings by Refugee of Spanish Nationality Domiciled in France—Competence of French Courts and Applicability of French Law.

LLUVIA *v.* LLUVIA.

France, Court of Appeal of Amiens. April 11, 1956.

THE FACTS.—Article 12 (1) of the Convention of July 28, 1951, relating to the Status of Refugees provides that

> " the personal status of a refugee shall be governed by the law of the country of his domicile. . ."

The respondent, a Spanish national, instituted divorce proceedings against his wife, the appellant herein, who was also a Spanish national. The Court of First Instance held that it was entitled to exercise jurisdiction over the parties and to apply French substantive law on the ground that the husband was a refugee within the meaning of the Convention. The wife appealed and contended that the husband was not a refugee within the meaning of the Convention but was free to enter Spain if he wished, and that the personal status of the parties was therefore governed by Spanish law, which permitted only judicial separation and not divorce, and that the French courts were not entitled to apply French law as governing the personal status of the parties.

Held: that, on the facts as found on the evidence (and not merely on the basis of documents issued to the husband by the French authorities, which in themselves would not be conclusive), the husband was a refugee within the meaning of the Convention of July 28, 1951, and that the French courts were accordingly entitled to apply French law as governing the status of the parties. The wife could, if she so wished, proceed with her cross-petition for judicial separation.

The Court said: " The Court of first instance held the husband's divorce petition to be admissible on the ground that the husband was, according to the administrative documents submitted by him, a refugee within the meaning of the Geneva Convention of January (*sic.*) 28, 1951, which was ratified by France by the Law of March 17, 1954, and published by Decree dated October 18, 1954. The wife contends that her husband spent some time with her in Spain in 1947 on the occasion of the birth of their third child and that he had a valid permit to return. She also contends that he was not inconvenienced on the occasion of that visit and that he cannot therefore claim the status of a refugee which is applicable, according to Article 1 (A) of the Convention, to any person who, as a result of events occurring before January 1, 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

" The production of administrative documents does not suffice to establish the status of a refugee before a civil court, which must ascertain whether in any particular case the personal status of an alien can be relied upon for or against him. The Court must investigate the position of the alien with regard to the Geneva Convention by reference to all the circumstances of the case. The Convention, according to Article 1 (C) thereof, ceases to apply to any person falling under the terms of section A if [paragraph 4] he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or if [paragraph 5] he can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality. The husband had, in fact, spent a short time in Spain, but he did not take up residence there. There is no proof that in returning to that country he intended to reside there. The Court cannot infer from the husband's journey to Spain that, as a former member of the police force of the Spanish Republic and as a member of an association of refugees, he can return to Spain with the certainty of being left in peace there. The circumstances referred to in paragraph 5 of Article 1 (C) of the Convention are circumstances of a general character, and there is no proof that the circumstances as a result of which the husband has been recognized as a Spanish refugee have ceased to exist. In these conditions the status of a refugee within the meaning of the Geneva Convention of January (*sic.*) 28, 1951, cannot be denied to the husband, and the judgment under appeal must be affirmed."

[Reports: *Gazette du Palais*, November 7–9, 1956; *Dalloz*, 1956, Som. 170; *Revue Critique de Droit International Privé*, 1957, p. 275, with Note by Sarraute.]

Aliens—Position of—Status of Refugees within Meaning of Refugees Convention of July 28, 1951—Divorce Proceedings by Refugee of Spanish Nationality Domiciled in France—Competence of French Courts and Applicability of French Law.

X. *v.* DAME X.

France, Tribunal Civil de la Seine. January 5, 1956.

THE FACTS.—Article 12 (1) of the Convention of July 28, 1951, relating to the Status of Refugees provides that "the personal status of a refugee shall be governed by the law of the country of his domicile . . . ." The petitioner was a Spanish national who had served in the Spanish Republican Army in the Spanish Civil War and was now domiciled in France, where he was recognized as a refugee within the meaning of the Convention by the "Office for the Protection of Refugees and Stateless Persons". He contended that by virtue of Article 12 (1), the French courts were entitled to exercise jurisdiction in divorce proceedings between himself and his wife who, like himself, was a Spanish national. The wife contended that as both parties were Spanish nationals their personal status was governed by Spanish law, which did not permit divorce, and that the petitioner relied on his status as a "refugee" merely for the purpose of avoiding the application of Spanish law.

Held: that on the facts the petitioner was a refugee within the meaning of the Convention and recognized as such by the French authorities, and that his personal status was therefore governed by the Convention; accordingly, the French courts were entitled to exercise jurisdiction in divorce proceedings between the parties.

The Court said: "The wife contends that her husband, like herself, is a Spanish national and therefore not entitled to bring divorce proceedings against her because such proceedings are contrary to their personal status. In addition, she denies the husband's status as a 'refugee' and contends that he only relies on that status in order to avoid the application of his national law. She produces a certificate from the Spanish Consul-General in Paris, dated November 17, 1955, stating that the husband's name is contained in the register of nationals of the Consulate-General. From the evidence of the husband and the documents submitted by him it appears that after serving in the Republican Army in the Spanish Civil War the husband was imprisoned for a considerable time for that reason. It also appears that, according to a certificate issued by the French Office for the Protection of Refugees and Stateless Persons on April 17, 1953, which is valid until April 16, 1956, the husband is recognized in France as a 'refugee' and that he is described as a 'Spanish refugee' on the residence permit which was issued to him by the police prefecture on November 20, 1950, for a period of three years and subsequently extended until November 20, 1956. Lastly, according to a certificate of the Office for the Protection of Refugees and Stateless Persons he is entitled to the benefits of the Convention of July 28, 1951, and 'his personal status is therefore governed by French law'. We accordingly give official notice to the parties of their respective contentions in so far as concerns their personal status and the admissibility of the divorce petition which the husband intends to file against his wife. This Court must deal with the petition and adjudicate upon its admissibility.[1] For these reasons the husband is authorized to proceed with his petition, his attention having been drawn to the fact that as he is still a Spanish national a decree which might be granted by a French court will be wholly ineffective as far as the Spanish authorities are concerned."

[Report: *Gazette du Palais*, March 17–20, 1956.]

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[1] The peculiar wording of this and the preceding sentence is due to the fact that the present case is concerned with proceedings designed to effect a reconciliation between the parties, and not to deal with the merits of the petition as such.

Aliens—Treatment of—Claim by Italian Tenant to Compensation on Termination of Business Tenancy in France—Relevance of Italian Law on Compensation of Tenants of Foreign Nationality in Italy in Like Circumstances—Reciprocity of Treatment—The Law of France.

SPINELLI *v.* DARONAT.

France, Tribunal Civil de Lyon. May 4, 1956.

THE FACTS.—Under French law, a tenant of business premises who is given notice to quit has, subject to certain exceptions not here material, the right to claim compensation from the landlord. The plaintiff, an Italian citizen, was given notice to quit a workshop occupied by him on premises owned by the defendant, and he accordingly claimed compensation from the latter. On behalf of the defendant it was contended that Italian citizens were not entitled to the benefits of the Law on which the plaintiff relied, while on behalf of the plaintiff it was contended that Italian law contained provisions similar to French law in the matter in issue between the parties, and that Italian law did not differentiate between Italian citizens and aliens; accordingly, reciprocity of treatment was guaranteed under Italian law, with the result that the plaintiff, as an Italian citizen, was entitled to compensation in accordance with the relevant provisions of French law.

Held: that as Italian law did not differentiate between the rights of tenants of Italian and foreign nationality, there was reciprocity of treatment, and the plaintiff was therefore entitled to compensation.

The Court said in part: " The Italian Laws of May 23, 1950, and May 1, 1955, do not exclude foreigners from their application. Furthermore, they do not deal with the status of the persons who are entitled to benefit from them, but with ' tenancies and sub-tenancies ' creating privity of estate between those entitled to benefit and the owner of the property, in the same way as the French legislation on business premises protects the tenancies. It follows that French citizens in Italy are entitled to benefit from the legal protection to which reference has been made." The Court then examined Italian law in more detail and expressed the view that it conferred benefits comparable to those conferred by French law and that the plaintiff was therefore entitled to rely on the " benefit of legislative reciprocity ". It held that the plaintiff was entitled to compensation and that the amount must be ascertained in the light of evidence not at that time before the Court.

[Report: *Gazette du Palais*, August 22–24, 1956.]

NOTE.—See also the judgment of the *Tribunal Civil de la Seine* dated May 16, 1956, in the case of *Ursino* v. *Burguet*: *Gazette du Palais*, September 19-21, 1956.

Aliens—Treatment of—In Time of War—Dispossession in Country of Residence—Inter-Allied Declaration of January 5, 1943, Invalidating Acts of Dispossession—Persons Affected by Declaration—Jews of Roumanian Nationality Resident in France during Second World War—The Law of France.

See p. 758 (*Cohen-Klarsfeld* v. *Pouchard-Stopt*).

Aliens—Treatment of—Treaty Containing Most-Favoured-Nation Clause—Conflict with Municipal Law—The Law of France.

See p. 468 (*Orso and Nari* v. *Sevastopoulo*).

v.—Respect for Property. Expropriation

[*See also* PART IV, JURISDICTION: A, I, Territorial.]

Aliens—Respect for Property of—Economic Measures against Aliens in War Time.

See p. 701 (*Compañia Farbenfabriken Bayer, Soc. por Acciones* v. *Sterling Products International, Inc.*).

III.—Expulsion of Aliens

i.—Right of Expulsion

Aliens—Expulsion of—Right of Expulsion—Whether Liability of Alien to Expulsion Affected by European Human Rights Convention, 1950—" Right to Respect for Family Life " under Convention —The Law of Germany.

EXPULSION OF ALIEN (GERMANY) CASE.

German Federal Republic, Federal Administrative Supreme Court.
October 25, 1956.

THE FACTS.—Article 6 of the Constitution of the Federal Republic of Germany provides that " marriage and family shall be under the special protection of the State ", and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 28, 1950, provides that " everyone has the right to respect for his private and family life, his home and his correspondence " and that " there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others ". The plaintiff, who was the holder of a Belgian passport (although his present nationality appeared to be uncertain), had been living in Germany since 1940 when he arrived in that country as a prisoner of war. In 1951 he was convicted of certain offences and sentenced to a term of imprisonment. The German authorities refrained from ordering the plaintiff's expulsion from Germany on the ground that he intended to marry a German woman. The marriage took place in 1953, and the plaintiff continued to live in Germany for some years thereafter with his wife and the child of the marriage as well as with two illegitimate children born to the wife before the marriage and of whom he was not the father. Relying on the Police Ordinance of August 22, 1938, the German authorities subsequently ordered the plaintiff's expulsion on the ground that he had been convicted of a criminal offence in 1951. The plaintiff appealed against the expulsion order.

Held: that expulsion of the plaintiff would be contrary to Article 8 of the European Human Rights Convention in that it would compromise the unity of his family, and as there was no overriding interest of public safety which would require his expulsion the expulsion order must be quashed.

The Court said: " By virtue of these Articles [see headnote, *supra*] the family is under the special protection of the State. This means not only that the public authorities must take the necessary steps to safeguard the family both morally and culturally, but also that in decisions like the present, which leave some scope for discretion, due regard must be paid to the effect of the decision on the family in question. If the unity and integrity of the family are threatened, the interests of family protection must be taken into account and set against other public interests. It is Article 8 of the Convention which shows how public interests should be assessed.[1] It is beside the point, as the plaintiff states in his appeal, whether or not his Belgian nationality has become uncertain. Nor is it relevant to know the effect of the marriage on the nationality of his wife. The illegitimate children born to his wife before the marriage have in any case retained their German nationality and not acquired another nationality. Furthermore, it is improbable that these children will be readily accepted by another State, in view of the economic and personal circumstances of the plaintiff. Should the expulsion order be put into effect, the wife would be obliged either to follow her husband and part from the illegitimate children born to her before her marriage, who are still very young, or to part from her husband in order to remain with her children. It is probable, of course, that a way of reuniting the family will eventually be found, but in view of the circumstances the separation

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[[1] The Court here set out the wording of Article 8 of the Convention.]

is likely to continue for some time. The unity of the family will be compromised by this separation. It is true that he has no parental connection with the children born to his wife before the marriage, but the children must nevertheless be reckoned as belonging to his family, within the meaning of the above-mentioned provision. Since, for these reasons, the expulsion order represented a serious threat to the plaintiff's family, it was necessary to consider whether the special conditions laid down in Article 8 of the Convention as a justification for such a threat were fulfilled. The facts of the case reveal that these conditions were not fulfilled. Although the serious offences committed by the plaintiff might seem to justify the expulsion order despite its adverse effect upon his family, the fact remains that he has a good record since his convictions, and the offence committed at the time was not regarded by the authorities as sufficiently serious to call for his immediate expulsion on release from prison."

[Reports: *British Year Book of International Law*, 33 (1957), p. 317; *Deutsches Verwaltungsblatt*, 1957, p. 57.]

Aliens—Expulsion of—Aliens Resident for Long Period of Years —The Law of Argentina.

Re SOSA.

Argentina, Supreme Court. March 23, 1956.

THE FACTS.—Lino Sosa, a Paraguayan national and a member of the crew of the *Ygurey*, a ship of Paraguayan registry, was reported to the Argentine immigration authorities by the Compañía Marítima Holandesa, S.A.C., as having deserted his ship in an Argentine port in 1950. The Company later requested that he be admitted to permanent residence in Argentina. The immigration authorities refused this request, issued an order for Sosa's detention for violation of Article 29 of Law No. 13.482,[1] and ordered the Company to act as his surety. In 1951 he was given a three months' suspended sentence for illegal entry into the country. In 1955 the Company again sought Sosa's admission to permanent residence. The immigration authorities refused this request on the ground that Sosa did not satisfy the health requirements of the Immigration Law. He was detained for deportation, whereupon he sought release on a writ of *habeas corpus*. The case came before the Supreme Court on extraordinary appeal.

Held: that the request for release on *habeas corpus* should be granted. Deportation could not be permitted where an illegal entrant had demonstrated over a period of years his capacity for permanent residence in the country.

The Court, after reviewing the facts, said: "In several previous cases, this Court has denied the protection sought by foreign seamen who have entered the country illegally and who have been detained by the National Immigration Administration for deportation. These decisions have been based upon the power of the National Government to regulate the admission of aliens to the country, subject to constitutional norms, and upon the consideration that illegal entrants should not be permitted to benefit by the guarantees of Article 14[1] (now Article 26[2]) of the National Constitution, for any other interpretation would enable aliens to enter the country without regard to the formalities laid down by law (*Fallos de la Corte Suprema*, vol. 171, p. 310; vol. 183, p. 373; vol. 188, p. 326; vol. 205, p. 628). In these cases, however, the offenders had been in the country too short a time to permit them to seek a change of status.

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[1] *Anales de Legislación Argentina*, VIII, p. 210, at p. 218.

" In another case (*Fallos de la Corte Suprema*, vol. 200, p. 99), the Court, reaffirming the power of the Government to regulate and control the admission of aliens in conformity with constitutional requirements and in consideration of the common good, pointed out that no particular time-limit had been prescribed by law whereby an illegal entrant could regularize his status to that of legal entrant and become a lawful resident. Nevertheless, the Court noted the possibility that such irregular status can be purged in a case where a person has not only presented a past record of good conduct but has also demonstrated within this country over a period of time of reasonably sufficient duration his loyalty to the country and his attachment to its national principles, thereby qualifying him to invoke the constitutional guarantee of permanent residence in this country.

" It is possible, then, without violating the respective constitutional norms which govern the subject matter, to reconcile the State's power to regulate the admission of aliens to the exceptional situation in which deportation several years after an alien has established *de facto* residence in the country would inflict a grave hardship on him, in effect amounting more to an unjust expulsion than to a simple matter of enforcement of immigration laws.

" In the present case, there seems to be little doubt that, from the time he entered the country, Sosa tried, with the assistance of the steamship company, to regularize his status. Various documents attesting to this fact have been submitted and have not been denied or objected to as being irrelevant or insufficient. These documents indicate that when the immigration authorities took action against the petitioner for illegal entry, they give him a minimum suspended sentence as a matter of form and made no further effort to interfere with his residence here until the recent order for his detention; that nearly four years later, when the petitioner again submitted a request for permanent residence together with certificates of employment and good character, deportation proceedings were reopened. There is nothing in the administrative record nor in the judicial proceedings to disprove these facts. With regard to the petitioner's capacity to engage in gainful employment, it is obvious that the only objection is that based upon a single health report, which appears in the record, and which cannot form a sound basis for objection in view of the fact that the petitioner has continued to work at his trade. It may be added that it is difficult to draw any conclusion from this report because it does not indicate whether the health condition in question preceded or followed the petitioner's entry into the country—nor is this point made clear in the record of the case; hence, the report has no bearing in the present proceedings.

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[1] *Anales de Legislación Argentina*, 1852–1880, p. 9.

[2] *Ibid.*, IX-A, p. 1.

" In conclusion, Sosa must be regarded as a resident of this country who must be granted the guarantee of permanent residence in conformity with the provisions of Article 26 of the National Constitution. Both the denial of his request for permanent residence and the subsequent renewal of the deportation proceedings are contrary to law. The judgment under appeal is reversed and *habeas corpus* is granted."[1]

[Report: *Fallos de la Corte Suprema*, vol. 234, p. 203.]

ii.—Procedure of Expulsion

Aliens—Expulsion of—Procedure of—Deportation to Territory Controlled by an Unrecognized Government—Discretionary Powers of Executive Branch of Government—The Law of the United States of America.

UNITED STATES *EX REL.* TOM MAN *v.* SHAUGHNESSY.

United States, District Court, Southern District, New York.

May 16, 1956.

THE FACTS.—Tom Man, a native of the Chinese mainland who had entered and remained in the United States illegally, petitioned for *habeas corpus* to stay a final order of the District Director of the United States Immigration and Naturalization Service which ordered his deportation to the mainland of China. Although Man had requested deportation to Formosa, which was controlled by the Chinese Nationalist Government, the District Director had failed, before making his order, to inquire of the Chinese Nationalist and the Communist Governments whether he would be acceptable to either Government if deported to its territory.

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[1] This case is also reported, with an editorial note by " Próculo ", in *Revista Jurídica Argentina La Ley*, vol. 82 (April–June 1956), p. 362.

Section 243 of the Immigration and Nationality Act (66 Stat. 212, 8 U.S.C. § 1253) provides that any alien found deportable shall be sent to the country of his choice if such country is willing to accept him. If rejected, the alien may be deported to the country of his nationality or citizenship or to that of his birthplace, or one of several designated countries, but in any case only if such country is willing to accept him. The Attorney General is directed to make the proper inquiries.

Man contended that the order directing his deportation to Communist China was improper because, *inter alia*, he had been denied his statutory election, and the consent of the Chinese Communist Government had not been obtained for his deportation thence. The District Director maintained that inquiry of the Chinese Nationalist Government would be futile because that Government consistently had refused to accept deportable Chinese.

Held: that the writ of *habeas corpus* must be granted unless the United States Government, as required by the statute, were to make inquiry of the Chinese Nationalist Government to ascertain the acceptability of Man. If he should be rejected, the writ would be sustained unless the United States were to make similar inquiry of the Chinese Communist Government, even though that Government was not recognized by the United States. The consent of the receiving nation was required for deportation, and under the facts of this case the consent of the Chinese Communist Government could not be presumed.

The Court said: " Section 1253 of title 8 U.S.C. determines to which country an alien may be deported. The first portion of that section deals with the first choice of the country to which the alien shall be deported:

> ' (a) The deportation of an alien in the United States provided for in this chapter . . . shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. . . . If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded.'

" Considering this requirement immediately, it is clear that, at his original hearing on November 24, 1953, relator specified Formosa as his preference if he had to leave this country. There is no record in the administrative file of this case nor is there any statement by the Government that an inquiry was addressed to the Nationalist Chinese Government as to its willingness to accept this relator. No doubt the Government would argue that such an inquiry would be an empty gesture in view of the Chinese Nationalist Government's prior statements that it would not accept any Chinese. See *United States ex rel. Fong Foo* v. *Shaughnessy*, 2 Cir., 234 F.2d 715 (Judge Frank).

" I do not believe such a contention would suffice to avoid the duty placed upon the Attorney General by the statute. No one can be positive that the Chinese Nationalist Government has not changed its position or that it will not make an exception as to this relator.

" My opinion in *United States ex rel. Scala Di Felice* v. *Shaughnessy*, D.C.S. D.N.Y., 114 F.Supp. 791, is in point. I there stated, at page 795:

' My view would be that a reasonably fair and adequate inquiry should be addressed by the Attorney General to the government of the country designated to determine whether that country will accept the alien. It seems to me that it would be inconsistent with the right afforded the alien by the statute if the Attorney General were free to proceed with deportation to another country without making any inquiry whatsoever . . . .'

" However, even assuming that the Government had inquired of the Chinese Nationalist Government and had received a negative reply, that would not suffice under the statute to permit deportation to Communist China. If Nationalist China did deny relator admission, other portions of § 1253 would then become applicable. Those portions are as follows:

> ' Thereupon [upon failure of the designated country to permit entry] deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, . . . whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion . . . either—
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> ' (1) to the country from which such alien last entered the United States;
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> ' (3) to the country in which he was born;
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> ' (4) to the country in which the place of his birth is situated at the time he is ordered deported; . . . or
>
> ' (7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.'

" In order for an alien to be deported to Communist China pursuant to the above alternatives, the Attorney General must have been advised by the Communist China Government that it would accept the alien. See *United States ex rel. Leong Choy Moon* v. *Shaughnessy*, 2 Cir., 218 F.2d 316, 318.[1]

[[1] See *International Law Reports*, 1954, p. 225.]

" While in most cases it might be presumed that ' the country in which he was born ' had consented to accept a deportable alien, see *United States ex rel. Hudak* v. *Uhl*, D.C.N.D.N.Y., 20 F.Supp. 928,[1] such a presumption, by itself, could not withstand the facts of this case. To begin with, it is arguable that the proposal is not to deport the alien to ' the country in which he was born ' but to ' the country in which the place of his birth is situated at the time he is ordered deported '. Moreover, the United States does not recognize the Communist Government in China and has no relations with it. Respondent does not state what method it will use to deliver relator into Communist China. Relator, in his petition, states: ' That in effect, it is the plan of the respondent to obtain a transit certificate or visa for the relator from the British Government enabling the respondents or agents employed by the United States Department of Justice to send relator to Hong Kong, where he will be admitted to that country in transit. That thereafter the appropriate officials of the United States Government will seek to either smuggle or otherwise surreptitiously remove the relator from Hong Kong and send him into the interior of Communist controlled China.' The Government, in its return to relator's petition did not controvert these allegations. If these allegations are true, it is clear that the Government does not intend to obtain the necessary consent of the Communist China Government. But without Communist China's agreement to admit relator, the statute will not permit his deportation to that country. See my recent memorandum in *United States ex rel. Hon* v. *Shaughnessy*, D.C.S.D.N.Y., 142 F.Supp. 468.

" The writ will be sustained unless the Government, within 30 days from this date, obtains and exhibits to the court and to relator's counsel, official documents permitting the landing of relator in Formosa, or advises the court and relator's counsel that it has made the inquiry of the Nationalist Chinese Government contemplated by section 1253. If the Government receives a negative reply from the Nationalist Chinese Government, the writ will be sustained unless a similar request is made of the Communist Chinese Government within 30 days of the receipt of the reply from the Nationalist Chinese Government. The Government shall advise the court and relator's counsel of such additional inquiry to the Communist Chinese Government.

" If the Government succeeds in obtaining official documents permitting the entry of relator into Communist China, I will then consider relator's application under section 1253 (h), relating to the possibility of persecution if he returns to Communist China."

[Report: 142 F.Supp. 444.]

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[1] [See *Annual Digest*, 1935–1937, Case No. 161.]

NOTE.—A similar issue of adequate inquiry arose in *United States ex rel. Lee Ming Hon* v. *Shaughnessy*, 142 F.Supp. 468 (S.D.N.Y. 1956), which is cited in the principal case. The District Director of the Immigration and Naturalization Service had ordered the deportation to Formosa of the relator, who had deserted from a vessel of the Chinese Merchants Steam Navigation Co., Ltd., on the basis of the assurance of the Chinese Government Procurement and Services Mission in New York, on behalf of the shipowner, that it would provide the necessary documents to secure the return of such deserters to Formosa. The Court sustained the writ of *habeas corpus* pending actual receipt of the necessary papers to insure entry into Formosa.

Aliens—Expulsion of—Right to Hearing Prior to Expulsion—Procedure Laid Down by Immigration Regulations—Immigration Regulation Invalid—The Law of Canada.

EX PARTE BRENT.

Canada, High Court of Ontario. July 5, 1954.
(Wilson J.)

Court of Appeal of Ontario. April 5, 1955.
(Roach, Aylesworth and Gibson JJ.A.)

Supreme Court. February 6, 1956.
(Kerwin C.J.C.; Taschereau, Rand, Kellock and Fauteux JJ.)

THE FACTS.—Section 61 (g) of the Immigration Act[1] allows Regulations to be made prohibiting or restricting the admission of persons to Canada for certain specified reasons. Regulation 20 (4) (b)[2] made under this Section did no more than repeat the provisions of the Section. Section 11 of the Act also provided that where a Special Inquiry Officer has to report whether the admission of an immigrant would infringe any particular provision of the Act or Regulations, that Officer should hold a " full and proper inquiry ".

The applicant entered Canada in January 1954. The Immigration Officer, and the Special Inquiry Officer to whom the applicant's case had been referred, both reported merely that the applicant could not be admitted because she did not meet the requirements of paragraph (b) of sub-section (4) of the Immigration Regulations, but did not specify the precise ground upon which her entry into Canada was considered undesirable. The applicant's appeal to the Minister of Citizenship and Immigration was dismissed without reasons being given. A deportation order was made and the applicant was taken into custody.

The applicant issued a writ of *habeas corpus* claiming that her detention was illegal and that the deportation order was made without jurisdiction or statutory authority. A writ of *certiorari* was also issued to quash the deportation order on the ground that it was made without jurisdiction.

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[1] R.S.C. 1952, c. 325.

[2] [1950] S.O.R. 536.

Held (by the High Court of Ontario): that the applicant must be discharged from custody. The deportation order was granted without an inquiry as required by the Immigration Act, and was therefore made without jurisdiction. [Report: [1955] 1 D.L.R. 693.]

On appeal,

Held (by the Court of Appeal of Ontario): that the appeal must be dismissed and the deportation order quashed. Section 20 (4) of the Immigration Regulations was invalid since, being virtually a repetition of Section 61 (g) of the Immigration Act, it was not made in exercise of the powers conferred by that Act, and a deportation order made under Section 20 (4) was therefore also invalid. Further, a deportation order made without a hearing as required by the Immigration Act was invalid.

The Court, after holding that proceedings by way of *habeas corpus* did not lie (*Masella* v. *Langlais*)[1] but that the application for *certiorari* remained to be considered, said: " The real point for consideration is whether or not respondent had a hearing as required by law, or, putting it in another way, whether the order of the Special Inquiry Officer was an order ' made under the authority and in accordance with the provisions ' of the Act. This question in turn involves two considerations, first, the validity of the Regulation upon which the Special Inquiry Officer purported to act and second, the nature of the inquiry which actually was held, assuming the validity of the Regulation. I turn first to a consideration of that Regulation. . . . [After setting out the provisions of Regulation 20 (4) (b) and of section 61 (g) of the Immigration Act, the Court continued:] It will seem at once that the specific subject-matters concerning which His Excellency in Council is authorized to make Regulations under cl. (g) of s. 61 are repeated verbatim in Regulation 20 (4) except for the ommission of the word ' climatic '. . . . In short, those limited powers of legislation, wide though the limits of the subject-matter may be, which Parliament has delegated to His Excellency in Council have not been exercised by the delegate at all, but, on the contrary, by him have been redelegated bodily. . . .

" I can find nothing in the Act expressly (or by inference, if that is permissible) manifesting any intention to permit or authorise any such procedure. . . . The Regulation is invalid and the order of deportation based upon it is invalid likewise, *delegatus non potest delegare*."

" For these reasons alone I would quash the deportation order, but that order, I think, is bad equally upon the ground that respondent actually was not accorded a hearing under the authority and in accordance with the provisions of the Act. . . .

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[1] [1955] 4 D.L.R. 346; see *International Law Reports*, 1955, p. 490.

" Section 23 of the Act makes it the duty of an Immigration Officer, after examination of a person seeking to come into Canada, to report that person to a Special Inquiry Officer if the Immigration Officer is of the opinion that it would, or may, be contrary ' to a *provision* of this Act or the regulations ' to grant admission to or otherwise let such person come into Canada. (The italics are mine) . . . . Section 11 of the Act, by s-s. (3) thereof, provides for ' a full and proper inquiry ' by the Special Inquiry Officer. Section 27 stipulates that the inquiry shall be in the presence of the person concerned wherever practicable; that the person concerned may, if desired, be represented by counsel; that the Special Inquiry Officer may receive and base his decision upon evidence considered credible or trustworthy by him, and that the burden of proving that he is not prohibited from coming into Canada rests upon the applicant for admission. . . . In the case at bar it is established beyond controversy that at the opening of the hearing before the Special Inquiry Officer respondent was in [a] hopeless position. She did not ' understand ' this Regulation—a lack of understanding which I find no difficulty in comprehending—whereupon the Special Inquiry Officer contented himself with informing the respondent that she could ' read English '. The decision of the Special Inquiry Officer, and the deportation order consequent thereon, states that respondent does not ' meet the requirements of paragraph (b) of subsection 4 of Section 20 of the Immigration Regulations '. If those requirements were to be met in their entirety and without any indication of any particular alleged infringement thereof, an endeavour to do so, however earnest, would be absolutely impossible. For these reasons also the order is bad and should be quashed." [Report: [1955] 3 D.L.R. 587.]

On further appeal,

Held (by the Supreme Court): that the appeal must be dismissed and the deportation order quashed. A deportation order was invalid if made under Regulations which were not properly made in exercise of powers conferred by the Immigration Act.

Kerwin C.J.C., delivering the judgment of the Court, said: " I agree with Aylesworth J.A. speaking on behalf of the Court of Appeal, that Parliament had in contemplation the enactment of such Regulations relevant to the named subject-matters, or some of them, as in His Excellency in Council's own opinion were advisable and not a wide divergence of rules and opinions, everchanging according to the individual notions of Immigration Officers and Special Inquiry Officers. There is no power in the Governor General-in-Council to delegate his authority to such officers."

[Report: [1956] 2 D.L.R. (2d) 503.]

D—EXTRADITION

II.—Extradition of Nationals

Extradition—Of Nationals—Option on Part of Accused—The Law of Argentina.

In re MILAZZO, alias D'AMORE.

Argentina, Supreme Court of Justice. September 28, 1956.

THE FACTS.—Milazzo was arrested in Argentina pursuant to a request for provisional detention made by the Embassy of the United States, which at the same time initiated extradition proceedings. He was accused of grand larceny committed in New York on September 20, 1948. Milazzo, an Argentine national, applied for trial in Argentina, pursuant to Article 669 of the Code of Criminal Procedure, which grants this right of choice when the accused is of Argentine nationality. It was held at the trial, and later on appeal, that the accused should be tried in Argentina.

On further appeal,

Held: that the judgments below must be affirmed. The decision of the Supreme Court was based not on Argentine law but on the Extradition Treaty between Argentina and the United States at that time in force, Article 3 of which provided:

> " In no case shall the nationality of the person accused be an impediment to his extradition, under the conditions stipulated by the present treaty, but neither Government shall be bound to deliver its own citizens for extradition under this Convention; but either shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so." (Malloy, *Treaties*, vol. 1, p. 26.)

The Court said: " The Treaty therefore establishes delivery as the general principle, but with the reservation of cases in which the requested Government deems it advisable not to acquiesce in the extradition. . . . As to the advisability of not granting extradition, this depends on the personal and family circumstances of the individual demanded, and these appear on the record. This is a case of an Argentine citizen married to a woman of the same nationality, with two children now of the ages of thirteen and eleven years, all of whom he supports by his work in honest activities, and who enjoys a good reputation for that reason and for his good conduct."

[Report: *Fallos de la Corte Suprema de Justicia de la Nacion*, vol. 235, p. 964.]

III.—Conditions of Extradition. Extraditable Crimes

Extradition—Conditions of—Necessity for Formal Request for Extradition—Irregularity of Procedure in State from which Extradition Sought—Whether Person to be Extradited Entitled to Rely on Irregularity when Tried in Requesting State—Waiver of Extradition Procedure by Person to be Extradited—Effect of —Principle of Specialty—Whether Principle of Specialty Applies in Absence of Formal Extradition—The Law of Canada.

REGINA *v.* GAGNON.

Canada, Quebec Court of Sessions of the Peace. October 11, 1956.
(Theberge J.S.P.)

THE FACTS.—In 1954 Lucien Gagnon, a Canadian citizen, was arrested in Canada for receiving stolen property. He was remanded on bail, but failed to appear for his trial. In August 1956, he was arrested in New York, U.S.A. The Director of Quebec Provincial Police immediately notified the New York police that a warrant for the arrest of Gagnon had been issued in Canada. Gagnon, knowing that he was held on a charge which would justify his extradition to Canada, nevertheless freely made, before two Judges separately, an incontestable waiver of the extradition procedure and consented to return voluntarily to Canada in the custody of a Canadian police officer who had been sent to New York to escort him back to Canada. On return to Canada, Gagnon was charged with having committed an offence under s. 125 of the Criminal Code, 1953–54 (Can.), c. 551 (skipping bail). Gagnon contended that, having been extradited from the United States of America on a specific charge of receiving stolen property, he could not, in virtue of s. 33 of the Extradition Act, R.S.C. 1952, c. 322, be charged with any other offence. The prosecution contended that Gagnon had not been extradited because he had waived extradition following his apprehension in New York, and that consequently s. 33 of the Extradition Act did not apply.

Held: that the accused was not entitled to the benefit of s. 33 of the Extradition Act. An accused could not avail himself of the priviliges of s. 33 of the Extradition Act if he had not been brought back to Canada in pursuance of an extradition arrangement between Canada and the State from which he had been returned.

Theberge J.S.P., after stating the facts, continued: "It seems strange that two waivers should be given before two different judges. Section 651 of the United States Code of Criminal Procedure, on Extradition, lists the judges who have jurisdiction to hear extradition cases. Judge Schweitzer, presiding in a court of record, appears undoubtedly to have such jurisdiction. I remark here that the United States has no special Extradition Court; the power to hear such cases is vested in judges of defined courts. Although the city magistrate appears not to have jurisdiction I am inclined to believe that he may deal with preliminaries in extradition matters, but not, of course, with the hearing and adjudication of them. I did not examine into the extent of the city magistrate's jurisdiction, being of the opinion it was immaterial on this point on account of the positiveness of Judge Schweitzer's jurisdiction. In any event, it is a recognized principle in international law that a fugitive who has been extradited cannot avail himself of any irregularities in the legal procedures of the foreign State. Tribunals are not called upon to decide on the questions of regularities or irregularities in extradition proceedings, as extradition is considered an act of sovereignty which the Government alone may appreciate.

" Now that the documents emanating from New York authorities are known, the essential ones having been reproduced *in extenso*, I believe it would lead to a better understanding of the whole question if I were to revert to the starting point in Canada, to the crime that brought up the question of extradition.

" On 14th June, 1954, Lucien Gagnon, a then practicing lawyer in the City of Montreal, appeared before the Court of Queen's Bench on the following charge, laid under the provisions of the former Criminal Code:

> " ' On the 9th of February and the 20th of March, 1954, receiving unemployment relief stamps to the value of $18,890.88 and postal stamps of Canada to the value of $2,938.54, totalling the sum of $21,829.42 the property of Her Majesty the Queen and knowing them to have been stolen contrary to Section 399 of the Criminal Code, and also possession of same, knowing them to have been stolen.'

" On the date set for his trial, and at several adjournments of same, Gagnon failed to appear.

" As already mentioned, on 20th August, 1956, Mr. Hilaire Beauregard, Director of the Quebec Provincial Police, sent a telegram to the Commissioner of Police of the City of New York requesting the continued detention of Gagnon. One Marcel Patenaude, a lieutenant-detective of the Quebec Provincial Police, proceeded to New York with a bench warrant which had been issued by the Court of Queen's Bench two years previously.

" For a better understanding of the United States procedure in extradition cases I reproduce the sections of the Code of Criminal Procedure (U.S.A.) dealing with that country's law and general pratice in these matters.

" Section 662d, in the chapter dealing with Extradition, enacts:

> " ' Whenever, under sections 662b–662e of this title, it is desired to obtain the provisional arrest and detention of a fugitive in advance of the presentation of the formal proofs, such detention may be obtained by telegraph upon the request of the authority competent to request the surrender of such fugitive addressed to the authority

competent to grant such surrender: Provided that such request for provisional arrest and detention is accompanied by an express statement that a warrant for the fugitive's arrest has been issued within the jurisdiction of the authority making such request charging the fugitive with the commission of the crime for which his extradition is sought to be obtained.'

" In order to secure a fugitive's extradition there must be a formal requisition by the State seeking the surrender of the fugitive, all in accordance with the convention or treaty of extradition in force between the two nations involved. The formal requisition for the surrender of a criminal fugitive may be addressed to the Secretary of State by some person recognised as a diplomatic representative of the foreign State. The Secretary of State may inform a local magistrate and require him to issue a warrant for the criminal's arrest or further detention as the case may be.

" Section 30 of The Extradition Act, R.S.C. 1952, c. 322 provides for the manner in which a requisition emanating from Canada is to be made. The section reads:

> " ' 30. (1) A requisition for the surrender of a fugitive criminal from Canada, who is or is suspected to be in any foreign state with which there is an extradition arrangement, may be made by the Minister of Justice
>
> ' (a) to a consular officer of that state resident at Ottawa, or (b) to the Minister of Justice or any other minister of that state, through the diplomatic representative of Her Majesty in that state.
>
> ' (2) If neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement.'

" It is clear and it may be said without fear of contradiction that before extradition can be proceeded with and ordered or refused as the case may be the one country must have received a requisition from the country seeking extradition of the fugitive, in pursuance of the treaty or convention of extradition between the two. That is a condition *sine qua non*. The requisition is the essential factor, the determining, fundamental factor without which the one country is powerless to act. Lacking such a requisition the foreign country might, of course, deport a fugitive or provide for his departure in some other manner, but such departure could not be in accordance with international law on extradition and pursuant to the convention between the two countries.

" I will continue with reproducing the sections of the Code of Criminal Procedure (U.S.A.) dealing with that country's law and general practice in these matters:

" Article 651 (Fugitives from foreign country) enacts:

> " ' Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, or commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any

> State, may, upon complaint made under oath, charging any person found within the limits of any State, District, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulation of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. (R.S. 5270; June 6, 1900, ch. 793, 31 Stat. 656)'
>
> "Article 654 (Time allowed for extradition) enacts:
>
> "'Whenever any person who is committed under sections 651, 652–655, 658–663 of this title or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered. (R.S. 5273)'

"Now that one is acquainted with the United States' laws on extradition, which are similar in substance to our own, one is in a better position to understand fully the process of the law and the true implication of the different waivers given by Gagnon.

"For the benefit of the discussion it may be said that apart from these waivers there is one outstanding point that is of the utmost importance: The proper authorities in Canada never made, in accordance with s. 30, a requisition for Gagnon's extradition. Not only was there no requisition but Gagnon waived a possible requisition which had not yet materialized or might never have come to light. It is quite obvious that Mr. Beauregard's telegram of 20th August cannot be considered as a requisition nor can Mr. Beauregard be considered a competent authority to requisition the surrender of a fugitive criminal. Except for the bench warrant issued in Montreal, as aforesaid, which could not be executed in New York, no other documents whatsoever were ever filed or brought to New York by Marcel Patenaude.

"Moreover, before Judge Schweitzer, who undoubtedly had jurisdiction in matters of extradition, there was no requisition from Canada filed, as mentioned above, no sworn complaint, no evidence offered, no hearing, no commitment—in fact there was no extradition case whatsoever, but just a declaration from Gagnon of his willingness to return to Canada, coupled with waivers on matters that had not yet been set in motion.

"If a requisition for his surrender had been made and Gagnon had confined his waivers to the proceedings only, the privileges available to a fugitive through s. 33 might be pleaded with success.

"Even had a hearing taken place, following a requisition, and Judge Schweitzer deemed the evidence sufficient to sustain the charge and so certified to the Secretary of State and a warrant of surrender issued, extradition does not necessarily follow, for to complete the process the committed person must be delivered up and conveyed out of the United States. Otherwise, as may be seen from s. 654, the fugitive may be freed and as a result of his being freed there would be no extradition. May I add here that besides the waivers which set aside any question of extradition, precautions were taken by the authorities in New York to show that Gagnon consented, in his own declaration, to return to Canada voluntarily in the custody of Lieutenant-Detective Marcel Patenaude.

"Finally, study of the documents referred to above might indicate that there were some preliminaries that might have led to an extradition, but in fact and in law there was no extradition pursuant to any extradition arrangement between the two countries. Therefore, s. 33 of our Extradition Act, which reads as follows:—

> "'33. Where any person accused or convicted of an extradition crime is surrendered by a foreign state, in pursuance of any extradition arrangement, he is not, until after he has been restored or has had an opportunity of returning to the foreign state within the meaning of the arrangement, subject, in contravention of any of the terms of the arrangement, to a prosecution or punishment in Canada for any other offence committed prior to his surrender, for which he should not, under the arrangement, be prosecuted'

does not apply.

"The principle enunciated in s. 33, which has been adopted by every nation having conventions or treaties of extradition, dates back to the English Extradition Act of 1870. It is therein provided, as already seen, that a surrendered criminal shall not be tried for any but the crime for which he is extradited. But, before s. 33 can be applied, the extradition must be made in pursuance of an extradition arrangement. That appears to be also a condition *sine qua non.*

"I would conclude, therefore, that Gagnon not having been brought back to Canada in pursuance of any extradition arrangement between Canada and the United States, cannot avail himself of the privileges of s. 33."

[Report: Criminal Reports (Canada), vol. 25, p. 38.]

Extradition—Conditions of—Trial for Offence Other than That for which Extradition Granted.

In re BOOTEN.

Belgium, Court of Cassation. June 18, 1956.

THE FACTS.—This was an appeal by one Booten, a Belgian national, against his conviction by the Court of Appeal of Ghent on May 2, 1956, on a charge of fraud in respect of acts committed in France in the winter of 1953. One of the grounds of appeal was that the prosecution on this charge was a violation of Article 10 of the Franco-Belgian Extradition Convention of August 15, 1874, in that the appellant, when charged, was " involuntarily " in Belgium: he had been extradited from France on another charge, while in respect of the proceedings here at issue the formalities of extradition had not been complied with, nor had they been waived by the appellant.

Held: that the question of the regularity of the appellant's presence in Belgium had not been raised before the Court of first instance, and could accordingly not be considered on appeal.

The Court said: " The appellant does not deny that he was found in Belgium. It appears from the decision of the lower Court, and from the summons served on the appellant requiring him to appear before the *Tribunal correctionnel,* that he was in Belgium, being detained there.

" The allegation that he was not regularly found in Belgium in the meaning of Article 10 of the Law of April 17, 1878, is not supported by any of the documents of the proceedings to which the Court may make reference. Moreover, that allegation was not made before the Court of first instance, and the Court of Appeal was accordingly likewise not called upon to consider the regularity of the manner in which the appellant was found in Belgium."

[Report: *Pasicrisie Belge,* 1956, I, p. 1145.]

Extradition — Conditions of — Rule of Specialty — Extradition Granted in Respect of Unexpired Portion of Sentence—Trial of Accused for Offences Committed After Escape from Prison—Reciprocity—Law of Requesting Country Permitting Extradition Only for Indictable Offences—Accused Tried for Lesser Offences—Illegality of Trial for Such Offences—The Law of Austria.

AUSTRIAN EXTRADITION CASE.

Austria, Supreme Court. July 17, 1956.

THE FACTS.—The appellant, who was serving a prison sentence in Austria, escaped from prison and thereafter committed certain non-indictable offences in Austria. About a week later he escaped to the German Federal Republic. The German authorities granted the Austrian request for his extradition for the express purpose that he might serve the remainder of his prison sentence in Austria. Notwithstanding the limited purpose of the extradition so granted, the appellant was tried for and convicted of the non-indictable offences which he had committed after his escape from prison and before crossing the German frontier. It was contended on his behalf that the convictions should be quashed on the grounds that they violated the rule of specialty and that, as Austrian law did not permit extradition for non-indictable offences, reciprocity required that the Austrian courts should not claim the right to try an extradited person for such offences.

Held: that both contentions of the appellant must be upheld and the convictions quashed.

The Court said: " The judgment of the Court below is not in accordance with the law. It is concerned with criminal offences committed by the appellant after his escape from prison between September 19 and September 28, 1951. Thereafter he left Austria, and on September 28, 1951, he was arrested in the territory of the German Federal Republic. The competent foreign authorities extradited him solely for the purpose that he might serve the remainder of his sentence. Moreover, this extradition was limited to that part of the remainder of his sentence which was not concerned with the offences referred to under points (iii), (iv) and (v) of the decision of the Court below. According to the contents of the file, the appellant's extradition was not granted in respect of the offences which he committed between September 19 and September 28, 1951. His conviction for these offences thus violated the generally recognized rule of specialty which, according to Article 9 of the Federal Constitutional Law, forms part of Austrian federal law. His conviction for the contravention (*viz.*, non-indictable offence) provided for in Section 464 of the Criminal Code also violates the principle of reciprocity which equally forms part of Austrian federal law, because, according to Section 234 (2) of the Criminal Code, foreign nationals cannot be extradited for non-indictable offences committed abroad, nor can they be punished for such offences in Austria. For this reason a foreign State is not entitled to request the extradition of an Austrian national for a non-indictable offence."

[Report: ÖR, 1956, p. 137.]

Extradition—Conditions of—Extradition Conditional upon Undertaking Not to Inflict Capital Punishment—Change of Municipal Law Subsequent to Extradition Treaty—The Law of Argentina.

Re Candino de Pepe.

Argentina, Supreme Court. November 21, 1956.

The Facts.—Italy sought the extradition of Rosa Candino de Pepe on charges of felonious homicide in connection with the deaths of her husband and of a priest and of complicity in the concealment of the corpses, the latter being a criminal offence according to Article 141 of the Italian Penal Code. The petitioner appealed from a decision of a lower federal court granting the request. In his report to the Supreme Court on the case, the Procurator General recommended that the extradition request be denied for two reasons: that the Italian authorities had submitted insufficient evidence to support surrender on the first charge; and that the offence on which the second charge was based did not appear among those listed in Article 6 of the Extradition Treaty of 1886 between Italy and Argentina,[1] nor was it known in Argentine penal law.

Held: that the extradition request must be granted. " An extradition proceeding does not involve the adjudication of the charges on which surrender of a fugitive is sought; but where the asylum State does not recognize capital punishment, extradition may be granted on the condition that such penalty shall not be applied to the accused by the requesting State."

The Court, after reviewing the facts, said: " As the Procurator General has pointed out, the second charge contained in the extradition request cannot be regarded as affording an admissible basis for surrender, not only because it concerns an offence which is not included among those listed in Article 6 of the Treaty with the requesting State but also because this offence does not appear in Argentine penal law. It must be pointed out that the offence which is described in Article 171 of our Penal Code and which the requesting authorities plead as comparable to that described in the extradition request is, in fact, distinctly different from the latter offence.

" With regard to the charge that the petitioner was implicated in the homicides, the Court agrees with the Procurator General that the evidence submitted by the requesting authorities does not substantiate this charge, for it does not indicate clearly whether the fugitive participated in these offences nor the circumstances of the time, place, and method of commission of the offences; however, it must be pointed out that the Italian authorities found this evidence sufficient grounds on which to order the arrest of the petitioner. Furthermore, we cannot accept as a bar to the present extradition proceeding the plea that an Argentine court may have found similar evidence submitted in a similar process against the children of the petitioner to be insufficient. That decision may not deprive the Italian courts of their jurisdiction over the petitioner, who, by reason of her Italian nationality, is liable to process before the courts of Italy on charges arising out of acts which took place in that country.

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[1] *Anales de Legislación Argentina*, 1889–1919, p. 263.

"This Court has gradually established as jurisprudence the following rules which are to be observed in extradition proceedings in this country: judicial commitment to the fundamental objective of maintaining universal law and order by means of the prosecution of criminals by the courts of the country in which their offences were committed (*Fallos de la Corte Suprema*, vol. 156, p. 169; vol. 178, p. 81); it must be accepted that the courts of the requesting State will apply the law of the land justly (*Fallos de la Corte Suprema*, vol. 187, p. 371); the application of the legal rule most favorable to the accused is a criterion for the courts which must adjudicate the merits of criminal cases (*Fallos de la Corte Suprema*, vol. 156, p. 169; vol. 154, p. 157); an extradition proceeding does not involve any interpretation of the relevant legislation of the requesting State nor any determination as to the guilt or lack thereof of the accused whose surrender has been requested (*Fallos de la Corte Suprema*, vol. 42, p. 409; vol. 97, p. 39; vol. 106, p. 20; vol. 117, p. 137; vol. 150, p. 316; vol. 166, p. 173; vol. 178, p. 81, etc.). In consideration of these principles, it follows that extradition will not be denied where there has been compliance with all the requirements laid down in an extradition convention between the interested States. Where the courts of the requesting State have ordered, for reasons submitted in the record, the detention and trial of a person whose extradition has been sought, an Argentine court does not have the authority to examine the merits of these charges nor to render a decision as to whether or not the charges have been proved against the accused, for these matters fall entirely within the jurisdiction of the courts of the State in which the charges were initiated.

"Likewise, the presumed mental condition of the accused, to which reference has been made in the record, cannot be advanced as a bar to extradition, for, in accordance with the principles stated above, the determination of this matter together with its relevancy to the charges comes within the jurisdiction of the courts of the requesting State.

"The possibility, however, that the Italian courts might invoke the death penalty in this case is a factor to be weighed in reviewing the judgment under appeal. Certainly the provisions of the Extradition Convention with Italy of 1886, which was ratified by Law No. 3035 of November 18, 1893, do not require the requesting State to agree to apply only the minimum penalty in the event of a conflict between its law and that of Argentina in this matter. This Court has repeatedly held that a treaty text must be interpreted literally. It should be pointed out, however, that after the said Treaty went into force, capital punishment was abolished in Argentine penal law. In this case we are faced, not with the possibility of the application of a maximum or a minimum penalty, but rather with the possibility of the application of a penalty which has been abolished in our common law. As Fiore points out in his *Treatise on International Penal Law and Extradition* (Madrid, 1880, p. 334), in a situation in which an offence with which a fugitive is charged carries a penalty of capital punishment and the asylum State, in conformity with the law of nature, does not recognize the death penalty, extradition will be granted only on condition that the fugitive will not be subject to this extreme penalty. Article 3 of the Protocol designed to bring the Convention of 1886 into conformity with the Italian Penal Code, which was concluded by both States on June 9, 1904, and approved by the Argentine Government on December 17, 1904, leads to a similar conclusion.

"In view of the above considerations as well as of the report of the Procurator General, this Court affirms the lower Court's decision to grant the request for the extradition of Rosa Candino de Pepe to Italy on the charge of felonious homicide involving the persons of Vicente Pepe and the priest, Mauro Cassata, but only on the condition, which must be agreed to through the diplomatic channel, that in the event of her conviction she will not be subject to capital punishment."[1]

[Report: *Revista Jurídica Argentina La Ley*, vol. 86 (April-June 1957), p. 366.]

Extradition—Conditions of—Preliminary Examination of Evidence Submitted in Request for Extradition—Extraditable Offences—Principle of Double Criminality—Identity of Accused—The Law of Venezuela.

Re SANTIS ATENCIA.

Venezuela, Federal Court. March 13, 1956.

THE FACTS.—Colombia requested the extradition of Manuel Santis Atencia, a Colombian national, on charges of embezzlement and misrepresentation. Santis Atencia, seeking his release from detention, argued that the extradition request did not conform to (1) the requirements of the Bolivarian Treaty on Extradition of 1911,[2] regarding indentification of the fugitive and his complicity in the offences charged, or (2) the requirement of Article 354 of the Bustamante Code (or Code of Private International Law of 1928)[3] which provides that where the penalty for the offence is less than one year's imprisonment, extradition may not be requested, and that the Bolivarian Treaty does not make any reference to the offence of embezzlement.

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[1] Four of the five Judges of the Court supported this decision. In a dissenting opinion, Judge Alfredo Orgaz argued that extradition should not be conceded for the reasons set forth in the opinion of the Procurator General.

[2] Colombia, *Leyes Expedidas por el Congreso Nacional*, 1913, p. 160.

[3] *L.N.T.S.* vol. 86, p. 111.

Held: that the request for extradition must be granted.

The Court, after reviewing the facts, said: "The extradition request is supported by the following documents: (*a*) an authenticated copy of the pertinent provisions of the Colombian Penal Code and Code of Penal Procedure concerning the offences of embezzlement and misrepresentation with which Manuel Santis Atencia is charged; and (*b*) the warrant for the arrest of the accused, which has apparently been issued by the appropriate authorities acting in accordance with the laws of the requesting State. The Colombian request is based upon Article 1 of the Bolivarian Treaty on Extradition which provides:

> 'Extradition will only be granted upon the submission of evidence showing that the offence is one for which the fugitive could be detained or brought to trial in the asylum State had the alleged offence been committed therein.'

"Given the specific provision of Article 1, it follows that we must examine the evidence submitted by the requesting State with a view to determining whether it would afford sufficient grounds for the arrest of Santis Atencia under Venezuelan law or, in other words, whether the grounds upon which the warrant for arrest was issued conform to the requirements of Article 182 of our Code of Criminal Procedure. This Article provides that a warrant for arrest can issue only where there is *proof* that the offence charged carries a penalty of corporal punishment and where there is *prima facie evidence* of complicity of the accused in the offence charged.

"In the opinion of the Court, the evidence submitted in support of the extradition request meets the first requirement, for the accused has been charged with offences which are directed against the public order. With regard to the second requirement, *i.e.*, *prima facie* evidence of complicity of the accused in the offence charged, it has been argued on behalf of the defendant that the evidence adduced by the requesting authorities does not clearly establish the fact that the defendant had any part in the offences imputed to him, and it has been submitted that the defendant has denied any responsibility for the said offences. These statements notwithstanding, the Court finds that an analysis of the record affords ample proof of the circumstances in which Santis Atencia, while serving as an assistant cashier in a customs house, committed the offences imputed to him. In fact, the warrant for his arrest was issued on the basis of an exhaustive examination of the various methods which were used to embezzle the customs house funds and to falsify documents and schedules. It is quite clear that the collection of funds and the responsibility for the records thereof are included among the duties of an assistant cashier of customs, the position held by Santis Atencia. These circumstances establish a definite relationship between (1) the proved fact, *i.e.*, that at the time when the offences were committed Santis Atencia held the position of assistant cashier at the customs house at Bogotá and that, in the exercise of this function, he was responsible for collecting money and maintaining records thereof; and (2) the act, that is, Santis Atencia's complicity in the offences.

" In the opinion of the Court, the above points would constitute sufficient grounds for the issue of a warrant for the arrest of Santis Atencia under our law. Moreover, this conclusion is supported by his testimony before the trial court of this Federal Court, in which he admitted that his duties included the receiving of money collected in the customs house and that he was aware of the fraudulent manoeuvres respecting the alteration and falsification of manifests and schedules, for in his deposition there is a minute and detailed account of the various stratagems and skilful methods used to alter the amounts appearing in the manifests which certainly constitutes conclusive evidence of his implication in the offences.

" The accused has pleaded that he was not party to the embezzlement of the funds in that he only transmitted such funds which he had collected to the Chief Cashier and that he had no knowledge of the subsequent disposition of the money; he has stated further that his fear for his personal safety led him to refrain from disclosing his knowledge of these fraudulent activities. These matters are questions of fact, however, which must be decided by the trial court of the requesting State and hence cannot be properly raised before this Court.

" It has also been argued that the extradition request must fail because of certain defects therein, notably that the identity of the fugitive has not been clearly established. In our opinion, this plea may be disregarded because there appears to be little doubt about the identity of the accused; on the contrary, the accused, in his testimony before the trial court, admitted that he was Manuel Santis Atencia and that he was the person named in the extradition request. Another alleged defect in the request is the fact that embezzlement is not included among the extraditable offences listed in the Extradition Treaty between Venezuela and Colombia of July 18, 1911. With regard to this argument it must be observed, on the one hand, that the said list includes the offence of forgery of official documents, which is similar enough to one of the offences charged against the accused to warrant his extradition; and on the other hand, that the Treaty also includes the offences of larceny and robbery of money or goods, a category which would seem to comprehend embezzlement.

" Finally, it has been argued that if there is some doubt as to the guilt of the accused and if it is not known whether the penalty which he might receive would be less than one year's imprisonment, according to Article 354 of the Bustamante Code he cannot be extradited. Regarding this plea, the Court must point out that among the supporting documents submitted with the extradition request there is an authenticated copy of the penalties which are applicable under Colombian law to the offences of forgery of official documents and embezzlement. As these penalties exceed one year of imprisonment, the argument is without merit.

"For the above reasons, and considering that Venezuelan law interposes no bar to extradition for embezzlement and forgery of official documents, that these offences are included in the Extradition Treaty between Venezuela and Colombia, that documentary evidence has been submitted to show that under Colombian law neither the death penalty nor life imprisonment may be imposed for said offences, and that the pertinent provisions of the Venezuelan Penal Code and Code of Criminal Procedure as well as those of the Treaty have been complied with, this Federal Court, administering justice in the name of the Republic and under authority of law, orders that Manuel Santis Atencia, a Colombian national of adult years, be extradited to the Republic of Colombia."

[Report: *Gaceta Forense* (Secunda Etapa), Año 1956, No. 11 (January–March), p. 98.]

IV.—Procedure of Extradition

Extradition—Procedure of—Warrant by Description—Insufficient Identification of Persons Described—Whether Warrant, Even if Good by Law of Requesting State, Must Comply with Local Law —Extradition between United Kingdom and Eire.

THE STATE (ROSSI AND BLYTHE) *v.* BELL.

Eire, High Court. July 2, 1956.

(Murnaghan J.)

THE FACTS.—On June 23, 1956, warrants were issued in England for the arrest of two persons on charges of unlawful wounding. The persons were not named in the warrants, and were identified only by general references as to age, height, and colour of hair. The warrants were endorsed for execution in Eire by a Deputy Commissioner of the Irish police, pursuant to the Petty Sessions Ireland Act, 1851, as adapted by the Petty Sessions Ireland Act, 1851, Adaptation Order, 1938, which apply to extradition proceedings between England and Eire. Using these warrants the Irish police arrested Blythe and Rossi, who applied for *habeas corpus*.

Held: that the warrants were bad, and that the men accordingly should be released.

Murnaghan J. said, *inter alia*: "Two points arose for consideration; first, whether a warrant by description was a good and sufficient warrant, and secondly, whether these warrants were good in England, and, if so, whether that sufficed to make them good here. . . . It is immaterial whether the warrants are good according to English law or not. Once the warrants come to be executed here, they must, in my opinion, conform to the legal requirements of an Irish warrant, which are shortly that the person against whom the warrant is issued must be named in the body of the warrant by his surname and Christian name; and in the very exceptional case where the name is unknown, that fact must be stated, and the person identified by such sufficient description as in the nature of the case to leave no reasonable doubt as to his identity."

[Report: (1957) *Irish Reports* 281; also reported in 90 *Irish Law Times Reports* 143.]

NOTE.—Upon release, the two men were at once re-arrested upon fresh warrants and surrendered to the United Kingdom authorities (*Irish Times*, July 3, 1956).

Extradition—Procedure of—Interpretation of Extradition Treaty —Whether Judiciary or Executive Competent to Interpret Treaty —The Law of France.

Re PETALAS.

France, Conseil d'État. February 3, 1956.[1]

THE FACTS.—The Franco-Hellenic Extradition Treaty of 1906 provides that if a person is not handed over to the requesting country "within three months after his arrest, he shall be set free." The applicant, whose extradition to Greece had been ordered, claimed that the period of three months referred to in the Treaty began to run on the day of his arrest by the French authorities for the purpose of initiating extradition proceedings against him, and that as he had been in custody for more than three months since that date he was entitled to be released. He further contended that not only the High Contracting Parties but also individuals affected by the operation of the Treaty were entitled to rely on its breach.

Held: (i) that the provisions of the Treaty were not clear and that a conclusive opinion of the Minister for Foreign Affairs must be obtained on their true interpretation; and (ii) that meanwhile the order for the applicant's extradition must be stayed.

The Court said: "In support of his application against an order for his extradition dated January 11, 1956, the applicant relies on the violation of Article 13 of the Franco-Hellenic Treaty of March 29/April 11, 1906, which provides:

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[1] For previous proceedings in this case see *International Law Reports*, 1955, p. 519.

> 'if the person claimed and arrested in pursuance of this Treaty is not handed over and brought forward [*amené*] within three months after his arrest he shall be set free and cannot again be claimed in respect of the same matter.'

The applicant contends that these provisions create obligations not only as between the Parties to the said Treaty but also for the benefit of individuals threatened with extradition, and that the latter are therefore entitled to rely on it to obtain the rescission of an order made against them. He further contends that the period of three months for which the Article provides begins to run on the day of the original arrest carried out by the Government requested to order extradition. The provisions which are being relied upon and which are contained in an international agreement are not clear on the points in dispute and cannot therefore be directly applied by the *Conseil d'État*. The merits of the applicant's contentions cannot therefore be judged by this Court until the provisions of the Treaty have been interpreted, which can only be done by the Minister for Foreign Affairs. Accordingly, a decision on this application must be deferred until the Minister has supplied an interpretation of the provisions with which we are concerned. Furthermore, if the order under appeal were to be carried out immediately, the personal liberty of the applicant would be gravely prejudiced. The decision of the Court therefore is: (1) We defer our decision until the Minister for Foreign Affairs has informed us whether Article 13 of the Franco-Hellenic Treaty of March 29/April 11, 1906, creates a right for the benefit of individuals threatened with extradition, and when the period there referred to begins to run; (2) the order of January 11, 1956, for the applicant's extradition must be stayed until we have reached a decision on the present application against that order."

[Report: *Gazette du Palais*, March 7–9, 1956.]

Extradition—Procedure of—Hearing Before Court of Requested Country—Whether Presence of Accused Required at Hearing—The Law of France.

Re SACCARDI.

France, Court of Cassation. November 8, 1956.

THE FACTS.—Saccardi, an Italian citizen, was sentenced to a term of imprisonment and a fine by the Assize Court of Turin, and Italy requested his extradition from the French authorities. At the first hearing before the *Chambre des mises en accusation* of the Court of Appeal of Paris, Saccardi was provisionally released, and the hearing of the request for extradition was adjourned until a later date. On the date fixed for the hearing it was found that Saccardi had left his place of residence. The Court proceeded in his absence, revoked the previous order for his provisional release, and recommended his extradition.

Held: that the order revoking the previous order for provisional release must be affirmed, but that the recommendation for extradition must be quashed; extradition proceedings were in the nature of contentious proceedings, and the presence of the accused at the hearing was therefore required.

The Court said: " According to Articles 14, 15 and 16 of the Law of March 10, 1927, the proceedings before the *Chambre des mises en accusation* in the matter of extradition are essentially contentious proceedings which must be suspended in the absence of the person concerned. The file attached to the request for extradition shows that Saccardi, an Italian citizen, was incarcerated in Paris on July 22, 1953, in pursuance of a provisional order for his arrest for the purpose of extradition following upon an order for his incarceration transmitted on April 24, 1952, by the prosecutor's office of Turin as the result of a sentence of 7 years and 10 months' imprisonment and a fine of 8,000 lire, passed by the Assize Court of Turin. On the same day Saccardi appeared before the *Chambre des mises en accusation* of the Court of Appeal of Paris, which examined him, and by judgment dated September 2, 1953, ordered his provisional release. The hearing on the merits was adjourned until October 14, 1953. Saccardi did not appear on the latter date. He alleged that he was in a poor state of health, and on October 28, 1953, the *Chambre des mises en accusation* accordingly appointed a medical expert to examine him. Saccardi did not attend for medical examination, and left his place of residence without leaving an address. By the judgment which is now under appeal and dated December 9, 1953, the *Chambre des mises en accusation* revoked the order of September 21, 1953, for his provisional release and in his absence recommended his extradition. While this decision is justified in so far as concerns revocation of the order for provisional release, it has nevertheless misconstrued Articles 14, 15 and 16 of the Law of March 10, 1927, by expressing a view on the question of extradition without having heard Saccardi. The *Chambre des mises en accusation* should have adjourned this part of the case until after the arrest of Saccardi, by restoring the request for his arrest transmitted by the Italian authorities, having first revoked the order for his provisional release. For these reasons the judgment of the *Chambre des mises en accusation* of the Court of Appeal of Paris of December 9, 1953, is reversed in so far as concerns the recommendation for the extradition of Saccardi. In so far as concerns the revocation of the order for provisional release, the judgment is hereby expressly affirmed."

[Report: *Gazette du Palais*, March 13–15, 1957.]

Extradition—Procedure of—Whether Decision to Extradite Subject to Appeal.

In re ROZZONI.

Belgium, Court of Cassation. December 3, 1956.

THE FACTS.—This was an appeal to the Court of Cassation from an opinion on a request for the extradition of the appellant rendered by the *Chambre des mises en accusation* of the Court of Appeal of Brussels on October 30, 1956. A preliminary question raised before the Court was whether an appeal to the Court of Cassation lay from such an opinion.

Held: that the appeal was irreceivable. The opinion of the *Chambre des mises en accusation* was not a decision, and accordingly could not give rise to an appeal to the Court of Cassation.

The Court said: " By the Act of March 15, 1874, the Government is empowered on its own exclusive responsibility to take a decision on a request for extradition submitted by the Government of a foreign country, after having sought the opinion of the *Chambre des mises en accusation* of the Court of Appeal within the jurisdiction of which the alien was arrested.

" The opinion of the *Chambre des mises en accusation* does not bind the Government, nor does it either deny a right to or confer a right upon the alien. Accordingly, it does not have the characteristics of a decision which, according to the provisions of Article 15 of the Law of August 4, 1832, can give rise to an appeal to the Court of Cassation."

[Report: *Pasicrisie Belge*, 1957, I, p. 345.]

NOTE.—A similar decision was given by the Court of Cassation on October 8, 1956 (*ibid.*, p. 107).

Extradition—Procedure of—Irregularity of Procedure in State from which Extradition Sought—Whether Person to be Extradited Entitled to Rely on Irregularity when Tried in Requesting State—Waiver of Extradition Procedure by Person to be Extradited—Effect of—The Law of Canada.

See p. 405 (*Regina* v. *Gagnon*).

PART VII

DIPLOMATIC AND CONSULAR INTERCOURSE AND PRIVILEGES

A—PERMANENT DIPLOMATIC ENVOYS

II.—Position and Functions of Diplomatic Envoys

Diplomatic Envoys—Functions of—Ambassador as Representative of Home Government in Foreign Court.

See p. 210 (*Republic of China* v. *Chuka Newspaper Co., Ltd., et Al.*).

III.—Privileges and Immunities of

i.—Diplomatic Envoys and their Staff

Diplomatic Immunities—Staff of Diplomatic Mission—Contract of Lease—Waiver of Immunity—Requirement of Consent of Sending State—The Law of Chile—Havana Convention Concerning Diplomatic Officers, 1928.

Acuña de Arce *v.* Solórzano y Menocal.

Chile, Supreme Court. November 26, 1956.

The Facts.—Señor Solórzano, First Secretary of the Mexican Embassy at Santiago de Chile, concluded a lease [*contrato privado de arrendamiento*] with Señor Acuña de Arce which provided, *inter alia*, that legal questions concerning its terms would be adjudicated by the local courts. When the lessee refused to vacate the premises before the expiration of the lease, the lessor obtained a court order for his eviction and, as a guarantee of her rights, an order for the attachment of the private automobile of the lessee. Subsequently, Solórzano appeared in court and agreed to vacate the premises and to compensate Señora Acuña de Arce for any losses involved therein. After the orders had been executed, Solórzano invoked his diplomatic immunity from the jurisdiction of the court and sought to recover his motor car. The case came to the Supreme Court on appeal. The Fiscal *ad hoc*, Professor Julio Escudero Guzmán, in his report on the case to the Supreme Court, made an exhaustive analysis of pertinent conventions, international practice, and the writings of publicists treating the subject of diplomatic immunity and concluded that under international law as well as Chilean municipal law and jurisprudence, Señor Solórzano was immune from legal process.

Held: that the appeal must be dismissed. A diplomatic agent was immune from the jurisdiction of the local courts in a civil action in which he was the defendant, and he could only waive this immunity with the consent of his Government.

The Court said: " According to Note No. 08227 of October 11, 1956, which the Court has received from the Minister of Foreign Relations, the Mexican Ambassador has made representations regarding the attachment of the automobile of Señor Enrique Solórzano y Menocal, First Secretary of this Embassy, effected in pursuance of a legal action initiated by Señora Lucía Acuña de Arce against Señor Solórzano. The Ambassador has protested that these proceedings violate the principle of diplomatic immunity as generally recognized in international law and as explicitly affirmed in Articles 14 and 19 of the Convention Regarding Diplomatic Officers, which was concluded at Habana on February 20, 1928,[1] and which has been ratified by both Chile and Mexico. The Minister of Foreign Relations has requested that the order for the attachment of Señor Solórzano's automobile be set aside and the vehicle restored to him.

" An examination of the record reveals the following facts: (*a*) Don Enrique Solórzano and Doña Lucía Acuña de Arce concluded a lease for the house at No. 1165, Calle, Elena Blanco in this city. Clause 15 of this lease provided: ' The parties agree that Santiago shall be considered their place of domicile and that all legal matters arising out of the lease, including nullification or cancellation, shall be subject to the jurisdiction of the local courts.' (*b*) On July 5, 1954, the lessor appeared before the Second Civil Court of Santiago to obtain an order requiring the lessee, Señor Solórzano, to vacate the premises. This order was served on Señor Solórzano. (*c*) On December 30, 1954, the defendant appeared before the Court and agreed that he would vacate the premises on February 1, 1955, and that he would compensate the lessor for any losses connected therewith. (*d*) It appears from the record that during these proceedings Señor Solórzano did not assert his diplomatic immunity. On March 25, 1955, however, after the definitive judgment had been rendered on February 9, and after the eviction of the lessee and the restitution of the premises to the lessor on February 17, the defendant invoked his immunity from local jurisdiction and sought to have the order set aside. The lower Court denied his petition and the issue comes to us on appeal. (*e*) As a guarantee of the rights of the lessor, the lower Court ordered that the private automobile of Señor Solórzano be attached, which order has been carried out.

" We must determine, first, the scope and limits of the diplomatic immunity which the Minister of Foreign Relations has claimed for the Secretary of the Mexican Embassy, and then decide whether this guarantee was waived by the defendant, or whether such immunity was affected in any way by the fact of his having concluded a lease which expressly provided, as quoted above, that he would submit to the jurisdiction of the courts of Santiago; and finally, what conclusions may be drawn from his having appeared in court without protest and his having agreed to the arrangements described above.

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[1] *L.N.T.S.*, vol. 155, p. 259.

" The Convention Regarding Diplomatic Officers, concluded at Habana on February 20, 1928, which the Minister of Foreign Relations informs us has been ratified by both Chile and Mexico, provides in Articles 14 and 19 as follows:

> '*Article* 14: Diplomatic officers shall be inviolate as to their persons, their residence, private or official, and their property. This inviolability covers:
> (a) All classes of diplomatic officers;
> (b) The entire official personnel of the diplomatic mission;
> (c) The members of the respective families living under the same roof;
> (d) The papers, archives and correspondence of the mission.'
>
> '*Article* 19: Diplomatic officers are exempt from all civil or criminal jurisdiction of the State to which they are accredited; they may not, except in the case when duly authorized by their Government, waive immunity, be prosecuted or tried unless it be by the courts of their own country.'

" The Fiscal *ad hoc*, in his report to the Court on this case, has expressed the opinion that the principle of exemption from jurisdiction of local courts must be understood to comprehend all of the acts of a diplomat. He has cited the French publicist, Professor Charles Rousseau, who in the 1953 edition of his treatise on international law stated that diplomatic immunity from jurisdiction is indivisible; and that no distinction may be made as to the nature of a particular act. Immunity would cover any civil act.

" This contemporary opinion is supported by the opinions of earlier writers, who have generally maintained that diplomatic officers are completely exempt from the jurisdiction of the State to which they are accredited because such officers personify the sovereignty of the State which they represent or serve. Thus Bello said: ' Another privilege of a public minister is his exemption from the jurisdiction of the State in which he resides . . .' (*Complete Works*, vol. 10, p. 383). André Weiss, commenting upon Article 14 of the French Civil Code, stated that as a general rule foreign ambassadors and all officers or agents associated in an official capacity with a diplomatic mission are exempt from French jurisdiction, and he concluded that with regard to immunity a diplomat in a sense cannot be distinguished from the State which he represents (*Private International Law*, 2d ed., Paris, 1890). Franz von Liszt, pointing out in his *Public International Law* (Barcelona, 1929) that immunity may be waived with the consent of the diplomat's Government, followed this statement with the opinion that ' the enforcement of a judgment is inadmissible because of the inviolability of the agent and of his domicile'. Julio Diena, Professor at the University of Padua, wrote in his *Public International Law* (1932 ed., p. 408) that 'Diplomatic agents are exempt from local jurisdiction, even in regard to civil and business matters.'

"It has been argued that the defendant waived his diplomatic immunity expressly and tacitly by agreeing to a lease which, in terms, required that the parties submit to the jurisdiction of the courts of Santiago, and by subsequently appearing in court. But Article 19 of the Habana Convention, quoted above, provides that such waiver can only be made upon the authorization of the diplomatic officer's Government. Given the fact that the Mexican Ambassador, in his note to the Minister of Foreign Relations, expressly stated that Señor Solórzano 'has not been authorized' by the Government of Mexico 'to waive his diplomatic immunity', we must conclude that any waiver by the defendant was not valid and that Señor Solórzano has continued to enjoy diplomatic immunity, and, therefore, to be exempt from the local jurisdiction.

"The Second Civil Court of Santiago may not take cognizance of a civil action in which Don Enrique Solórzano y Menocal, Secretary to the Mexican Embassy, is defendant. The case must be dismissed."

[Report: *Revista de Derecho* (Universidad de Concepción, Chile), vol. 25, No. 99 (January-March 1957), p. 119.]

Diplomatic Immunities—Staff of Diplomatic Mission—First Secretary of Embassy—Action in Respect of Failure to Pay Alimony —Absence of Immunity—Havana Convention of 1928 Concerning Diplomatic Officers—The Law of Chile.

Re ARECO LEÓN (MINORS).

Chile, Second Juvenile Court of Santiago. March 30, 1955.

THE FACTS.—A warrant for arrest was issued against Don Alberto Areco Pittaluga for failure to make alimony payments for a period of four months. The defendant pleaded to the jurisdiction on the ground that as First Secretary of the Uruguayan Embassy in France he was vested with diplomatic immunity. He submitted that according to Articles 578 and 580 of the Chilean Civil Code the present charge must be classified as a "personal" suit or action and that according to Articles 333 and 337 of the Code of Private International Law (Bustamante Code)[1] the Courts of the contracting parties could not take cognizance of "personal" actions in which the defendant was a foreign diplomatic agent.

Held: that the plea must be rejected. A diplomat may not invoke immunity from the jurisdiction of local courts in regard to his personal acts as distinguished from his official acts.

[1] *L.N.T.S.*, vol. 86, p. 111.

After reviewing the facts, the Court said: " The Court has been officially notified by the Ministry of Foreign Relations that Uruguay has not ratified the Convention on Private International Law; consequently, the provisions of that Convention which have been invoked by the defendant are not applicable to the present case. The only legislation applicable to this case is that provided for in the Convention Concerning Diplomatic Officers, concluded at Habana on February 20, 1923 [*sic.*, actually 1928],[1] which was ratified by Uruguay on September 16, 1936, according to information included in the communication from the Ministry of Foreign Relations to which reference has been made, and which was ratified by Chile on September 2, 1936.

" This Convention contains the following relevant provisions:

> '*Article* 19. Diplomatic officers are exempt from all civil or criminal jurisdiction of the State to which they are accredited; they may not, except in the case when duly authorized by their Government, waive immunity, be prosecuted or tried unless it be by the courts of their own country.'
>
> '*Article* 22. Diplomatic officers enter upon the enjoyment of their immunity from the moment they pass the frontier of the State where they are going to serve and make known their position.'
>
> ' The immunities shall continue during the period that the mission may be suspended, and, even after it shall be terminated, for the time necessary for the officer to be able to withdraw with the mission.'
>
> '*Article* 23. Persons belonging to the mission shall also enjoy the same immunities and prerogatives in the States which they cross to arrive at their post or to return to their own country, or in a State where they may casually be during the exercise of their functions and to whose Government they have made known their position.'

" It follows from the text of Article 23 that there are two situations in which diplomats enjoy, by exception, privileges and immunities in a third State: (a) where they cross the said State in order to reach their post or to return to their country; and (b) where they happen to be in such State ' during the exercise of their functions ' and after having notified the Government of their presence and position. It is clear from the terms of this Article that diplomats in situation (a) may enjoy diplomatic immunity without any other formality if it can be shown that they are members of a mission and crossing the State in order to reach their post or to return to their own country; whereas in situation (b) it must be shown that they are temporarily in the third State ' during the exercise of their functions ' and that they have given previous notice of their position.

" Relying upon the natural and obvious interpretation of the language used in the above Articles of the Convention, ' exercise ' may be understood to mean the performance or practice of an art or a profession. It must be concluded, then, that in order for the defendant, Don Alberto Areco, to enjoy the privilege of diplomatic immunity in the case *sub lite,* he must be able to show that at the time when the warrant was issued for his arrest he was ' exercising ' in the capital of this Republic a function inherent in his official capacity. This conclusion is strengthened by the philosophical principle which underlies the grant of ' diplomatic immunity ', which is, briefly, to protect the diplomat so that he can ' exercise the functions inherent in his office ' without interference from the local law of the State in which he is living temporarily or permanently.

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[1] *L.N.T.S.*, vol. 155, p. 259.

" According to the record, His Excellency the Ambassador of the Oriental Republic of Uruguay notified the Ministry of Foreign Relations of Chile that on Friday, March 11, ' the First Secretary of Embassy in the Diplomatic Service of Uruguay, Don Alberto Areco Pittaluga ' had arrived in Santiago. Although it has been shown that the defendant is ' the First Secretary of Embassy in the Diplomatic Service of Uruguay ', that ' he is temporarily in Chile ', and that both matters have been brought officially to the attention of the Government of this Republic, these facts do not suffice to establish that Señor Areco is in Chile ' in the exercise of his diplomatic function ', which is the indispensable requisite for the enjoyment of immunity. Whatever else may have been submitted in the pleadings, there is no specific statement as to whether Señor Areco came to the capital of Chile in his official diplomatic capacity or simply as a private citizen; indeed, the context of the official notification would lead to the latter conclusion.

" In the event that the defendant's plea of diplomatic immunity were to be sustained, it is appropriate to note that, in the opinion of the Court, this immunity would suffice to protect him from any judicial consequences arising from contracts or agreements which he might have entered into in pursuance of his official duties in the State in which he was temporarily or permanently stationed. It should be borne in mind, however, that the action giving rise to the present litigation did not arise out of a contract or agreement. It is, instead, the consequence of the application of a substantive legal norm of public order, *i.e.*, that a father is obliged to assume responsibility for the expenses of support and education of his legitimate children (Title IX, Book I, Civil Code) and to provide alimony therefor (Title XVIII, Book I, Civil Code); this legal norm is not comprehended within the scope of diplomatic immunity from local jurisdiction.

" This conclusion has been confirmed in the doctrine that diplomats enjoy privileges in and owe obligations to the country in which they are accredited. Among these privileges the most fundamental are personal inviolability and immunity from local jurisdiction; the obligations include respect for the laws of the State in whose territory they reside and the maintenance of irreproachable conduct therein. The eminent publicist, Miguel

Cruchaga Tocornal, referring to Fiore among other authorities, has stated in his treatise on *International Law* (vol. I, Editorial Reus, S.A., Madrid) that an act of a diplomat which does not arise out of his official functions must be regarded as a private act for which he may not invoke the privilege of inviolability (p. 473). It cannot be accepted that a diplomatic officer may contract a civil obligation and yet be exempted from the jurisdiction of the courts by reason of his enjoyment of the extraordinary and special privilege of immunity (p. 481). This comment is particularly pertinent to the case *sub lite.* Fernando Albónico, Professor of Private International Law, commenting in his dissertation upon the privilege of diplomatic immunity, has stated that acts carried out by a diplomat in his private capacity ' fall within the competence of the courts ' (p. 200). The same view has been advanced by Germán Vallejos Freire in his dissertation in which he has quoted the publicist, Sánchez de Bustamante, whose authority in the field of international law has been demonstrated by the fact that his name was given to the Code of Private International Law: ' On the other hand, when diplomats carry out any act or conclude any contract in their private capacity, as distinguished from their official capacity, they are subject to ordinary jurisdiction ' (p. 53).

" Given the above considerations, it must be concluded that this Court properly has jurisdiction over the present action. Furthermore, as Article 109 of the Judicial Code provides that ' where the appropriate court has taken cognizance of an action, there may be no derogation from this jurisdiction by a supervening cause ', it follows that this Court's jurisdiction will not be affected by any change in the defendant's status which may have occurred after the initiation of this action. Finally, the defendant has not been able to show payment of the alimony due on the date on which the warrant for his arrest was issued nor due at any subsequent time. Therefore the defendant's plea must be rejected."[1]

[Report: *Revista de Derecho, Jurisprudencia y Ciencias Sociales y Gaceta de los Tribunales*, vol. 53, Nos. 1 and 2 (January–April, 1956), Part II, p. 29.]

Diplomatic Immunities—Staff of Diplomatic Mission—Immunity of—Waiver of Immunity—Requirement of Consent of Head of Mission—The Law of Argentina.

See p. 430 (*Mazo de Stagni* v. *Stagni*).

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[1] An appeal from this decision was denied by the Court of Appeals at Santiago on April 16, 1955.

ii.—Subordinate Members of the Diplomatic Staff

Diplomatic Immunities—Subordinate Members of Staff of Embassies—Drivers—Immunity from Criminal Jurisdiction—Relevance of Nationality of Member of Staff—The Law of Brazil.

Re JURSITIS.

Brazil, Supreme Court. April 4, 1956.

(Edgar da Costa, Rapporteur; Guimarães, Riberito da Costa, da Andrada JJ.)

THE FACTS.—Jursitis, a Lithuanian national, was employed as a driver by the Austrian Embassy in Rio de Janeiro. On May 22, 1953, while driving a car belonging to the Embassy, he was involved in a collision. He was prosecuted and convicted by a Magistrate's Court under Article 129 of the Penal Code. An application for *habeas corpus* was made on his behalf on the ground that the Magistrate had no jurisdiction because (a) Jursitis was a member of the Embassy staff and (b) he was an alien.

The Court below held that the application must be dismissed. Jursitis as a driver was not a diplomatic officer and was therefore not entitled to immunity from the jurisdiction of the courts in criminal matters. In any event, he was not an Austrian national.

The applicant appealed from this decision.

Held (Guimarães and da Andrada dissenting): that the appeal must be dismissed. Diplomatic immunity did not extend to drivers in the service of an embassy.

The Court said: " The immunity must be limited to diplomatic agents, the official staff of the mission and members of their respective families residing with them." Jursitis was of Lithuanian and not Austrian nationality, and even if diplomatic immunity extended to servants employed by an embassy, it covered only those who were of the same nationality as the Head of Mission.

[Report: *Archivo Judiciario*, vol. 120 (October–December, 1956), p. 192.]

NOTE.—Guimarães and da Andrada JJ. dissented on the ground that the tendency of foreign writers of authority was to enlarge the scope of diplomatic immunity to " persons in the service of diplomatic agents, whatever their rank or nationality ". In the present case, the Austrian Embassy and the (Brazilian) Ministry of Foreign Affairs were in favour of the recognition of such immunity.

iii.—The Family and Retinue of Diplomatic Envoys

Diplomatic Immunities—Retinue of Head of Mission—Chauffeur to Ambassador—Absence of Immunity—The Law of Argentina.

Re Dorogoutsev.

Argentina, Supreme Court. February 29, 1956.

The Facts.—Egor Dorogoutsev, chauffeur to the Soviet Ambassador to Argentina and defendant in an action for damages for personal injury, applied to have the case heard in the first instance in the Supreme Court, which has original and exclusive jurisdiction over cases involving ambassadors, ministers, and foreign consuls.[1] In a report to the Court on the question, the Procurator General was of the opinion that the defendant was not a diplomatic officer and that the case did not fall within the original jurisdiction of the Court.

Held: that the request must be denied. An ambassador's chauffeur is not a diplomatic officer within the meaning of the Law defining the original jurisdiction of the Supreme Court.

The Court said: " The defendant has pleaded to the jurisdiction of the Penal and Correctional Court of Buenos Aires, invoking Article 1, clause 3, of Law No. 48,[2] and Article 21 of the Code of Criminal Procedure, both of which have been modified by Article 24, clause 1, para. (*d*), of Law No. 13.998.[3] According to this last statute, cases concerning domestic or service personnel of foreign ambassadors and ministers plenipotentiary are excluded from the original jurisdiction of the Supreme Court."

[Report: *Fallos de la Corte Suprema*, vol. 234, p. 80.]

Note.—*Cf. Mazo de Stagni* v. *Stagni*, decided by the Supreme Court on October 26, 1956 (*Revista Jurídica Argentina La Ley*, vol. 87 (July–September 1957), p. 237), in which the defendant was the Military Attaché of the Paraguayan Embassy at Buenos Aires. The Procurator General, in a report to the Court, recommended that the Court ask the Minister of Foreign Relations and Worship for precise information as to the defendant's official position and also whether the Paraguayan Embassy would permit him to be a party to proceedings before the Court. The Embassy refused to give such permission. It was held that, in consequence, the Supreme Court lacked jurisdiction over the case.

The Court said: " The Minister of Foreign Relations and Worship has informed the Court that the Paraguayan Embassy does not approve of the submission of its Military Attaché, Lt. Col. Pablo Stagni, to a jurisdiction other than that of the ordinary courts of this country.

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[1] Article 96, Constitution of 1949 (*Anales de Legislación Argentina*, IX–A, p. 18); Article 24, clause 1, para. (*d*), of Law 13.998 (*Anales de Legislación Argentina*, X–A, p. 221).

[2] *Anales de Legislación Argentina*, 1852–1880, p. 364.

[3] See *supra*, n. 1.

Consequently, and in accordance with the established jurisprudence of this Court, we will not take cognizance of this action. The present action, on its merits, does not come within the scope of the original jurisdiction of this Supreme Court."

iv.—The Official Residence of a Diplomatic Envoy

Diplomatic Immunities—Immunities of Envoys—Immunity of Embassy from Jurisdiction—Position of Embassy as Representing Sending State—Absence of *Jus Standi in Judicio.*

CLAIM AGAINST FOREIGN EMBASSY CASE.

Yugoslavia, Supreme Court of the People's Republic of Croatia.

August 30, 1956.

THE FACTS.—The plaintiff in this case was knocked down by a motor-car owned by the Military Mission of a foreign Embassy in Belgrade. He sued the Embassy for damages for injuries sustained in the accident. The District Court of Zagreb dismissed the claim on the ground that diplomatic missions of foreign States were "granted territoriality" and were exempt from the jurisdiction of the municipal courts unless they voluntarily submitted to the jurisdiction, which had not been done in this case.

On appeal,

Held: that the appeal must fail. A foreign embassy was not a juridical person and could not be sued; the real defendant in this case was therefore the foreign State which the Embassy represented. Foreign States were entitled to immunity from jurisdiction unless they voluntarily submitted to it, which the foreign State in question had not done.

The Court said: "In the present case the defendant is a foreign Embassy in the Federal People's Republic of Yugoslavia and consequently a diplomatic representative of a foreign State. However, embassies and other diplomatic agencies in our country cannot be regarded as juridical persons. They have no *jus standi in judicio.* Embassies and other diplomatic agencies are only representatives of foreign States, and only such foreign States [not their representatives] may be parties in judicial proceedings . . . Therefore, in the present case the real defendant is not the Embassy of the foreign State, it is the foreign State which the Embassy represents.

"International practice shows that States enjoy before foreign courts so-called 'jurisdictional immunity', *i.e.*, a State cannot be subjected to the jurisdiction of a foreign court without its consent. It is considered that this is a rule of international customary law.

"According to Article 19 (2) of the Introductory Law to the Code of Civil Procedure, . . . the jurisdiction of municipal courts extends to persons enjoying exterritoriality according to the principles of international law if and in so far as they expressly submit to the jurisdiction of the municipal courts or if the proceedings concern their property situated in our country or their rights *in rem* in property belonging to third persons and situated in our country. Although this rule applies to natural persons acting as the diplomatic agents of a foreign State, there is no doubt that the foreign State enjoys jurisdictional immunity to no less extent than the natural persons representing it. . . . It can therefore be held that the above-mentioned jurisdictional immunity of a foreign State before our courts is a rule of our law. Consequently, jurisdictional immunity exists according both to international practice and to our own positive law in respect of liability for damage caused by a motor-car belonging to a member of the staff of a foreign diplomatic agency or mission.

" Hence, the District Court was justified in dismissing the claim for lack of jurisdiction, notwithstanding that in the present instance the claim was wrongly brought against the Embassy of the foreign State instead of being brought against the foreign State itself, which may, under the above-mentioned conditions, be a party to proceedings before foreign courts."

[Report: *Naša Zakonitost*, No. 11 (1956).]

C—RIGHT OF OTHER PERSONS TO PRIVILEGES AND IMMUNITIES

II.—Representatives Sent By or Accredited to the United Nations

Representatives Accredited to United Nations—Immunities of—Action for Defamation—Appointment of Consul to Post of Representative with Rank of Minister—Effect of Appointment to Diplomatic Status after Acquisition of Jurisdiction by Court—Suspension of Action—The Law of the United States of America.

See p. 436 (*Arcaya* v. *Páez*).

IV.—Officials of International Organizations

Diplomatic Immunities—In General—Waiver of—Waiver of Immunities of Officials of International Organizations.

See p. 616 (*Khavkine* v. *Secretary-General of the United Nations*).

D—CONSULS

II.—Position and Functions of Consuls

Consuls—Position and Functions of—Whether Authorized to Receive Service of Process on Behalf of Sending Government—Foreign States—Exemption from Territorial Jurisdiction—The Law of the United States of America.

OSTER *ET AL.* *v.* DOMINION OF CANADA.

United States, District Court, Northern District, New York.

May 24, 1956.

Court of Appeals, Second Circuit. December 7, 1956.

THE FACTS.—This was an action by citizens of the United States, suing as individuals and as a class, against the Dominion of Canada for damages for injury to their property claimed to have been caused by the elevation of the water level of Lake Ontario through the construction of a dam by Canada. The dam spanned the boundary between the United States and Canada from its construction in 1903 until its removal in 1952 or 1953. The United States gave its consent to the construction on condition that the dam be not operated to the injury of United States citizens or property (32 Stat. 392), and Canada undertook to indemnify anyone so injured. The plaintiffs' claims had been the subject of diplomatic negotiations between the two countries, but no reparation had yet been made.

This action was instituted by personal service of process upon the Canadian Consul General in New York City as representative of the Dominion of Canada. The Canadian Ambassador suggested to the Court that the suit be dismissed because of the immunity of Canada from suit in the United States. Canada did not consent to suit and made no appearance.

Held (by the District Court): that the action must be dismissed because of failure to obtain jurisdiction of the defendant. The actions were *in personam* and required personal service of process upon the defendant or the appearance in Court of its authorized representative. The functions of a consul were limited to the protection of Canadian citizens within his district, and he had no authority to represent the sovereign in receiving service of process. The Court discussed, but did not decide, the issue of sovereign immunity.

The Court said: " It appears that the claims of United States citizens, including those of the plaintiffs in these particular actions, have been the subject of discussion and conferences between the diplomatic representatives of the United States and Canada. In fact the matter of the disposition of these and similar claims is still under consideration. This Court has delayed acting upon the ' suggestion ', above referred to, pending the outcome of such negotiations. It now appears however that the pendency of these actions may have tended to delay the progress of the negotiations and it is deemed advisable to decide the question raised.

" The filing of the suggestions by the Ambassador, as above mentioned, has statutory authority in the Federal Rules of Civil Procedure 12(h), 28 U.S.C.A. Their function is to bring the question of jurisdiction to the attention of the Court, *Rank* v. *United States*, D.C., 16 F.R.D. 310 and it is apparent that the Court should proceed no further in the cases until the question of jurisdiction is considered and decided. The burden of the suggestions filed in these cases is to the effect that the defendant is a sovereign and is immune from suit in this Court, such immunity not having been waived. It is also asserted in the suggestions filed that the service of process in these cases is insufficient to obtain jurisdiction over the person of the defendant.

" Upon the invitation of the Court, all interested parties were invited to present their views as to the jurisdiction of the Court at a hearing. Such a hearing was held, arguments were advanced and briefs were filed. Same have been considered; all of the pleadings and proceedings on file in the Clerk's office have been examined and it is concluded that there is a lack of jurisdiction and the actions should be dismissed.

" These are in personam actions and the presence of the defendant is an essential element of the jurisdiction of this Court. *Employers Reinsurance Corp.* v. *Bryant*, 299 U.S. 374, at pages 381 and 382, 57 S.Ct. 273, 81 L.Ed. 289. If there is a failure of jurisdiction, it arises either from insufficient service of process or the defendant's immunity from suit.

" Service upon the defendant in each of these actions was made by the delivery of a copy of the summons and complaint to the Consul General of Canada or some one connected with his office at New York City. It is apparent from the whole record that the sufficiency of such service was disputed at the time. The question is referred to but not decided in the case of *Puente* v. *Spanish National State*, 2 Cir., 116 F.2d 43.[1]

" No authority exists for the service of process in a manner other than that set forth in the Federal Rules of Civil Procedure. *Clark County, Nev.* v. *City of Los Angeles*, D.C., 92 F.Supp. 28. Concededly there is no precedent which recognizes as valid the type of service of process made here. The argument that these actions came to the attention of the Canadian authorities and thereby performed their notice-giving function as referred to in *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed.45 1,[2] is unavailing since the above decision refers to the function of pleadings rather than to the function of process.

[[1] See *Annual Digest*, 1938–1940, Case No. 70.]

[[2] *Ibid.*, 1947, Case No. 19 (noting the decision in the District Court).]

"The limitations upon the authority of a consul [are] discussed in *The Anne*, 3 Wheat. 435, at page 446, 4 L.Ed. 428. In fact a photostat copy of the appointment of the consul upon whom service was made in these cases is found among the papers in the *Oster* action and his power is limited by the terms thereof to the protection of the interests of Canadian citizens within his consular district. He is in no sense a managing agent.

"It is beyond argument that jurisdiction of the person in this type of action is a necessary requisite to the overall jurisdiction of the Court to adjudicate the claim submitted. Such jurisdiction must be acquired either by the service of process or by the defendant's appearance. *Ex parte Republic of Peru*, 318 U.S. 578, at page 587, 63 S.Ct. 793, 87 L.Ed. 1014.[1] Here the defendant has not appeared in any manner in these actions and a consideration of the effect of a holding that service upon a consul is service upon a sovereign is sufficient to conclude that the service of process here is ineffective to obtain jurisdiction over the person of the defendant.

"Having arrived at the above conclusion, it would seem unnecessary to discuss and decide whether or not the immunity, ordinarily granted to a friendly sovereign, is available to the defendant in these cases. The determination of that question is not essential to this decision and it is evident that same requires both research and consideration. The United States seems to have lately adopted a more restrictive theory of immunity [of] a foreign country or sovereign. See discussion in *Republic of China* v. *National City Bank*, 2 Cir., 208 F.2d 627 and in same case 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389. It is apparent from the file in the *Oster* case that there is a difference of opinion between the Canadian authorities and our Secretary of State's office as to the existence of the defendant's immunity in these cases. Whether or not the position of the United States will be followed by the courts is problematical although there seems to be a tendency in the reported cases to allow or disallow a plea of immunity in accordance with the action of the Executive Department.

"The decision here rests upon the lack of jurisdiction over the person of the defendant. Such defect is sufficient authority for the dismissal of these cases. This had been the holding of judicial precedents since *Herndon* v. *Ridgway*, 17 How. 424, 58 U.S. 424, 15 L.Ed. 100. Since there appears to be no chance of the curing of the defect, referred to above, by a proper service of process upon the defendant, each of the above actions will be and is dismissed. . . ." [Report: 144 F.Supp. 746.]

The plaintiffs appealed. On appeal,

[1 See *Annual Digest*, 1941–1942, Case No. 53.]

Held: *per curiam* (by the Court of Appeals) *sub nom. Clay et Al.* v. *Dominion of Canada*: that the decision of the District Court must be affirmed.

[Report: 238 F.2d 400.]

NOTE.—In *Huther et Al.* v. *United States*, 136 Ct.Cl. 655, 145 F.Supp. 916 (1956), the Court of Claims *held* that the mere fact that the Government of the United States had authorized the construction of the dam referred to in the principal case above did not make the United States liable in damages for injuries to the lands of citizens of the United States caused by the existence of that dam.

The Court went on to say: " It seems manifest that any damage that may have been caused to the plaintiffs was caused by the action of the Canadian government and recourse should be had by suits in the Canadian courts for any damages that were caused by the action of the Canadian government in the construction involved, and that any taking of property was for the use and benefit of the Canadian government, if such suits are permitted by the Canadian government, and, if not, representations and claims should be presented through authorized channels of the executive departments of the two governments."

Consuls—Position of—Honorary Consuls—The Law of Argentina.

See p. 448 (*Re Ruiz*).

III.—Privileges and Immunities of Consuls

Consuls—Privileges and Immunities of—Exemption from Jurisdiction of Local Courts—Action for Defamation—Effect of Appointment of Consul to Diplomatic Status after Acquisition of Jurisdiction by the Court—Privileges and Immunities of Representatives at the United Nations—Jurisdiction of Courts over Diplomatic Representatives—The Law of the United States of America.

ARCAYA *v.* PÁEZ.

United States, District Court, Southern District, New York.

October 15, 1956.

Court of Appeals, Second Circuit. June 17, 1957.

THE FACTS.—This was an action for libel, commenced on March 16, 1956, by a national of Venezuela against the Consul General of Venezuela in New York. The plaintiff, a political exile, alleged that the defendant had publicized Venezuelan newspaper articles reflecting unfavourably on his social, moral, political, and professional standing. This had been accomplished by the posting of copies in the Consulate, circulation of copies to a mailing list, and distribution of copies to visitors at the Consulate.

On April 10, 1956, the Venezuelan Ambassador requested the

Secretary of State of the United States to suggest that the action be dismissed by the Court because of the defendant's immunity from personal suit as a consul. The Secretary of State forwarded the request to the Court without comment. On April 13, 1956, the Venezuelan Government appointed the defendant Alternate Representative of Venezuela before the United Nations, with the rank of Envoy Extraordinary and Minister Plenipotentiary. Upon further inquiry by the Court, the Secretary of State informed the Court that:

" . . . The Department of State desires to submit for your consideration the following comments in the premises:

" 1. After the receipt by the Department of notification, dated April 26, 1956, of his appointment by his Government, an identity card was issued to Mr. Páez which he received on May 3, 1956, and which stated that he was entitled to the privileges and immunities set forth in Public Law 357, 80th Congress, approved by the President on August 4, 1947.

" 2. The Department of State is of the opinion that the subsequent acquisition by Mr. Páez of diplomatic status would not defeat any jurisdiction with respect to him which may have been acquired on March 16, 1956, by the United States District Court for the Southern District of New York in the action. The Department of State makes no comment on the question of whether the court at that time did in fact acquire jurisdiction over Mr. Páez.

" 3. It would appear, however, that Mr. Páez' present status as a diplomatic representative of the Republic of Venezuela to the United Nations may not be questioned and that Mr. Páez is, therefore, at the present time entitled to all the privileges and immunities granted such representatives under Public Law 357, 80th Congress."

The defendant moved for summary judgment and dismissal of the complaint, contending that the suit must fail because (*a*) he had performed the alleged acts at the request of the Ambassador and that his immunity as a consul extended to such official duties; (*b*) he was immune from personal suit by virtue of his ambassadorial rank acquired after the commencement of the action; and (*c*) the District Court did not have jurisdiction of a suit involving one of ambassadorial rank.

The plaintiff contended that the jurisdiction of the Court over the defendant was properly obtained and could not be ousted by a later change of status, and that the activities alleged were not within the recognized scope of consular duties and were therefore not covered by the defendant's immunity as a consul.

Held (by the District Court): that the motion for summary judgment must be denied and the motion for dismissal of the complaint allowed to the extent of granting a stay of proceedings for such time as the defendant should retain his ambassadorial rank. The immunity accorded to consuls extended only to acts performed in the course of their consular duties, which were essentially commercial in nature unless broader powers were recognized by the receiving State. The libel complained of did not fall within the scope of the commercial functions of the Consul General of Venezuela, no enlargement of which had been recognized by the Department of State of the United States.

Under the law of the United States, persons of ministerial and ambassadorial rank were accorded immunity from service of process, and actions against such persons could be entertained only in the Supreme Court. However, by instituting a suit against the Venezuelan Consular General, who was not immune from process, the plaintiff acquired the right to prosecute the action to completion, and that right could not be defeated by the subsequent appointment of that official to ambassadorial rank. The action must, however, be stayed for so long as the defendant might retain his ambassadorial status.

The Court said: " An accredited resident representative to the United Nations, with the rank of Envoy Extraordinary and Minister Plenipotentiary is entitled in the territory of the United States to all privileges and immunities accorded to diplomatic envoys accredited to the United States. The Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, Section 15, P.L. 357, 80th Congress, First Session, Joint Res. Aug. 4, 1947, c. 482, 61 Stat. 756, 762, provides:

> ' (1) Every person designated by a Member as . . . a resident representative with the rank of ambassador or minister plenipotentiary,
>
> ' (4) . . . shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it.'

" Putting aside for the present the motion to dismiss for failure to state a claim, defendant raises questions of two kinds: the question of jurisdiction of the court over suits against diplomatic representatives and the question of the immunity of diplomatic representatives even though the court may have jurisdiction.

" On the question of jurisdiction, the power of the District Court to entertain an action against a consul seems to be conceded, as indeed it must be perforce section 1351 of title 28 of the United States Code. The power to entertain actions against ' ambassadors or other public ministers of foreign states . . . not inconsistent with the law of nations ' is, however, vested exclusively in the Supreme Court by section 1251.

" On the question of immunity, a consul is not immune from suit except when the action is based upon acts which he has committed within the scope of his duties. *The Anne*, 3 Wheat. 435, 445, 4 L.Ed. 428; *The Sao Vicente*, 260 U.S. 151, 155, 43 S.Ct. 15, 67 L.Ed. 179;[1] *Lyders* v. *Lund*, D.C.N.D.Cal., S.D., 32 F.2d 308;[2]

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[1] [See *Annual Digest*, 1919–1922, Case No. 99, and *ibid.*, 1923–1924, Case No. 62.]

[2] [*Ibid.*, 1929–1930, Case No. 211.]

Carl Byoir & Associates v. *Tsune-Chi Yu*, 2 Cir., 112 F.2d 885, 886;[1] *Carrera* v. *Carrera*, 84 U.S.App.D.C. 333, 174 F.2d 496, 498.[2]

" An ambassador or minister is, however, absolutely immune from suit even though it be based upon personal transactions. *Magdalena Steam Navigation Company* v. *Martin*, 2 El. & El. 94.

" The court must, of course, determine its own jurisdiction without reference to the views of the Department of State. The questions of the diplomatic status enjoyed by a given defendant and the immunity to be accorded him are, however, questions where a determination of the Department of State is binding upon the court. *United States of Mexico* v. *Schmuck*, 293 N.Y. 264, 56 N.E. 2d 577.[3] . . .

" I do not feel that I ought to accept without examination a determination by the Department of State that the court did not lose any jurisdiction it had theretofore possessed when defendant was appointed representative to the United Nations. The determination that defendant is entitled to the privileges and immunities of the office of representation to the United Nations does, however, conclude me under the doctrine of *Matter of United States of Mexico* v. *Schmuck*, 293 N.Y. 264, 56 N.E.2d 577, *supra*. The question whether the appointment was colorable is therefore no longer open before me.

" That leaves for my decision the question (1) whether the court obtained jurisdiction of the subject matter before defendant's appointment as representative and, if so, the question (2) whether jurisdiction was ousted by that appointment and, if not, the question (3) whether defendant has immunity from this suit as consul and, if not, the question (4) whether one of the immunities of a representative of the United Nations is immunity from further prosecution of a suit begun before the acquisition of status as such representative.

" The answer to question one, whether the court obtained jurisdiction of the subject matter, must, as I said above, be in the affirmative. Section 1351 of title 28 of the United States Code expressly gives jurisdiction of suits against consuls to the district courts.

" The second question, whether that jurisdiction was ousted by defendant's appointment as representative, was correctly answered in the negative by the Legal Adviser to the Department of State. It is true that the jurisdiction of the Supreme Court over suits against ministers is exclusive under section 1251 of title 28 of the United States Code. It is also true that it has been held (although I have some doubt as the correctness of the ruling) that the bestowal of the *privileges and immunities* of diplomatic envoys upon representatives to the United Nations, by section 15 of the Joint Resolution of August 4, 1947, above quoted, deprives all courts except the Supreme Court of jurisdiction of suits against them. *Friedberg* v. *Santa Cruz*, 274 App.Div. 1072, 86 N.Y.S.2d 369.[1] Granting, however, the correctness of that ruling that the Supreme Court alone would have jurisdiction of a suit originally instituted against a representative to the United Nations, the acquisition of that status by a defendant after the district court had obtained jurisdiction of the subject matter of the suit would not oust the district court of jurisdiction.

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[1] See *Annual Digest*, 1941–1942, Case No. 121.]

[2] *Ibid.*, 1949, Case No. 99.]

[3] *Ibid.*, 1943–1945, Case No. 21.]

" In *People of Porto Rico* v. *Ramos*, 232 U.S. 627, 34 S.Ct. 461, 462, 58 L.Ed. 763, an action between two individuals, the plaintiff, a citizen of Porto Rico, and the defendant, a citizen of Great Britain, had been validly begun. Porto Rico intervened in the action as a party defendant alleging that it was interested in the property claimed by the plaintiff. The plaintiff then amended his complaint to make Porto Rico the sole defendant. Porto Rico moved to dismiss the complaint on the ground of sovereign immunity and lack of diversity jurisdiction. While holding that Porto Rico had waived any claim to immunity by voluntarily intervening, the court also stated:

' There is an assignment of error based on the proposition that by the amendment of the complaint the plaintiff and Porto Rico became the sole parties to the action, and they, being citizens of Porto Rico, the court lost jurisdiction of it. The proposition is not urged by plaintiff in error in its brief, and if the proposition did not raise a question of jurisdiction, we might pass it without comment. It is, however, enough to say of it that the original defendant, Wood, was properly sued, he then being a subject of Great Britain, and in possession of the land. Porto Rico, subsequently becoming a party, did not oust the jurisdiction. *Phelps* v. *Oaks*, 117 U.S. 236, 6 S.Ct. 714, 29 L.Ed. 888; *Hardenbergh* v. *Ray*, 151 U.S. 112, 14 S.Ct. 305, 38 L.Ed. 93.'

" In the *Phelps* case, cited by the Supreme Court in the above quotation, the Supreme Court was presented with the question of whether a substitution of a new defendant, on motion of the original defendant, destroys the valid diversity jurisdiction previously obtained between the two original parties to the action. In unequivocal language, which is applicable to this motion, the Supreme Court stated:

' Much less can the plaintiff's right to prosecute his action in the courts of the United States, once vested, be defeated by imposing upon him an adversary against whom he cannot maintain the jurisdiction of these tribunals.' 117 U.S. at page 240, 6 S.Ct. at page 716.

" A question similar to the one now before me was decided by the District Court of Appeals of California, in *Earle* v. *De Besa*, 109 Cal.App. 619, 293 P. 885. There, an action had been validly commenced against an alien in the state courts of California. Some time before the trial was concluded, the defendant was appointed Consul

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[1] See *Annual Digest*, 1948, Case No. 103, and *ibid.*, 1949, Case No. 100.]

General of the Republic of Peru. The defendant thereupon moved to dismiss the complaint on the ground that the state court had no jurisdiction over actions against a consul, citing the forerunner of 28 U.S.C. § 1351 which gives exclusive jurisdiction over actions against consuls to the federal courts. The California courts denied the motion, holding that, since valid jurisdiction had been obtained at the commencement of the action, it was not destroyed by a subsequent change of status of the defendant.

" I therefore do not believe that defendant's appointment as representative to the United Nations affected the jurisdiction of this court.

" The third question, whether defendant was immune when this suit was brought, involves the determination of an issue of fact. The State Department, though requested to suggest this immunity to this court by the Venezuelan Ambassador, merely submitted a copy of his letter without comment. The determination of the question is therefore left to the courts.

" As I stated at the beginning of this opinion, a consul is immune from only such suits as are grounded upon transactions within the scope of his official authority. Mr. Justice Story made a classic statement of the law in *The Anne,* 3 Wheat. 435, 445, 4 L.Ed. 428, which was adopted in *The Sao Vicente,* 260 U.S. 151, 155, 43 S.Ct. 15, 67 L.Ed. 179. Mr. Justice Story said:

> ' We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case; and therefore, we consider this claim as asserted by an incompetent person, and on that ground, it ought to be dismissed.'

" From that statement we learn that a consul's duties are commercial but that they may be enlarged by special authority. To be effective such an enlargement must, however, ' be recognized by the government within whose dominions he assumes to exercise it '. The Venezuelan Ambassador here asserted such an enlargement in his letter of April 10, 1956, to the Secretary of State. He said:

> ' I communicated to Mr. Páez my belief that once the newspapers and the American reading public had been informed of the truth concerning the subject matter of Dr. Arcaya's misrepresentations and concerning Dr. Arcaya's own political history, his baseless complaints and accusations

would thenceforth, seen in proper perspective, lose all credibility and news value.

' It was therefore in pursuance of his duties as a responsible agent of the Republic of Venezuela that Mr. Páez wrote a letter to " The New York Times " published in the issue of March 12, 1956, and it was also pursuant to those duties that he informed appropriate persons concerning information appearing in the Venezuelan newspapers which served to clarify the matters involved in Doctor Arcaya's charges. The Government of Venezuela feels not only that it was within the duties of Mr. Páez to do so but that he would have been remiss in carrying out his official instructions had he failed to do so.'

" If the alleged enlargement of defendant's duties had been ' recognized by the government within whose dominions ' it was assumed to be exercised, the Department of State would surely have so advised the court instead of submitting the letter without comment.

" I must therefore decide the question whether, on the record before me, the acts with which defendant is charged were within his commercial duties. As Judge Lowell said in *Lorway* v. *Lousada*, D.C.Mass., 15 Fed.Cas. pages 919, 920, No. 8517:

' No doubt our government, in all its departments, is bound to accord to the consul, after the executive authority has received him, the free exercise of all his consular authority, such as may exist by custom, treaty, or general international law. But, after he has done an act professedly official, I see no reason why an individual may not try the question here, whether the act was within the scope of his authority.'

I can find nothing to indicate that defendant's alleged acts were within the scope of his authority. I must therefore deny defendant's motion for summary judgment dismissing the case insofar as the motion is based upon diplomatic immunity of defendant as consul general.

" That leaves the fourth and final question, whether defendant's immunity as a ' diplomatic envoy ', conferred by virtue of his status as representative to the United Nations under the terms of section 15 of the Joint Resolution of August 4, 1947, prevents the prosecution of this action against him.

" This involves a question which, so far as revealed by the researches of any of those concerned, is novel: where a court has acquired jurisdiction over a defendant, what is its duty when that defendant obtains diplomatic immunity?

" It is clear that the court may not issue its process against such a defendant so long as he retains his diplomatic immunity. Section 4063 of the Revised Statutes, 22 U.S.C. § 252, provides:

' Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any ambassador or public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.'

" This provision is a codification of the act of April 30, 1790, c. 9, § 25, 1 Stat. 117, which was drawn from the statute 7 Anne, c. 12. That, in turn, was declaratory of, and did not alter, the law of nations. *In re Baiz*, 135 U.S. 403, 420, 10 S.Ct. 854, 34 L.Ed. 222, *Magdalena Steam Navigation Company* v. *Martin*, 2 El. & El. 94, 114, *supra*.

" In the latter case Lord Campbell had occasion to discuss the rationale of diplomatic immunity under the law of nations. There the Envoy Extraordinary and Minister Plenipotentiary of the Republics of Guatemala and New Granada was sued upon a cause of action which accrued after he had acquired that status. In granting judgment for the defendant, Lord Campbell said, p. 111, ' The great principle is to be found in Grotius de Jure Belli et Pacis, 2, c. 18, s. 9, " Omnis coactio abesse a legato debet " ' and added at pp. 113–114:

' Mr Bovill, being driven from his supposition that the writ in this case might be sued out only to save the Statute of Limitations, by the fact that it had been served upon the defendant, and by the allegation in the plea that it was sued out for the purpose of prosecuting this action to judgment, strenuously maintained that at all events the action could be prosecuted to that stage, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister. But although this suggestion is thrown out in the discussion which took place in the Common Pleas, in *Taylor* v. *Best* (14 Com. B 487, 493 (*per* Maule J.), it is supported by no authority; the proceeding would be wholly anomalous; it violated the principle laid down by Grotius; it would produce the most serious inconvenience to the party sued; and it could hardly be of any benefit to the plaintiffs. In the first place, there is great difficulty in seeing how the writ can properly be served, for the ambassador's house is sacred, and is considered part of the territory of the Sovereign he represents; nor could the ambassador be safely stopped in the street to receive the writ, as he may be proceeding to the Court of our Queen, or to negotiate the affairs of his Sovereign with one of her ministers. It is allowed that he would not be bound to answer interrogatories, or to obey a subpoena requiring him to be examined as a witness for the plaintiffs. But he must defend the action, which may be for a debt of 100,000l., or for a libel, or to recover damages for some gross fraud imputed to him. He must retain an attorney and counsel, and subpoena witnesses in his defence. The trial may last many days, and his personal attendance may be necessary to instruct his legal advisers. Can all this take place without " coactio " to the ambassador? Then, what benefit does it produce to the plaintiffs? There can be no execution upon it while the ambassador is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall.'

" Lord Campbell was thus of the opinion that the immunity of ambassadors was not limited to freedom from service of process. He regarded the ambassador's protection from the necessity of retaining an attorney in an action for libel, of subpoenaing witnesses for his defense and of personally attending the trial where he might be needed to instruct his legal advisors, as part of the protection to which he was entitled under the law of nations. No one has suggested that any court has ever held otherwise or suggested any good reason why a court should do so.

" I am clear therefore that this action should not at present be permitted to proceed against this defendant. I do not believe, however, that the action should be dismissed. If the summons had been served on defendant after he had attained the rank of a diplomatic envoy he would have been the victim of an unlawful act upon which plaintiff could base no rights. Here, however, plaintiff has lawfully served a summons on him. By that act plaintiff obtained at least two valuable rights: the right to prosecute the action without further service of process and the right to prosecute the action despite the subsequent expiration of the period limited for the institution of an action for libel. Must plaintiff lose these rights because of defendant's promotion? I see no reason for such a deprivation. It will not interfere with defendant's efficiency as alternate representative to the United Nations to have the action pend dormant while he fulfills the duties of his new office. If and when defendant loses his status and the immunity that goes with it, plaintiff ought to be allowed to proceed with his action.

" Something like that procedure was adopted by Eve, J., in *In re Suarez,* [1917] 2 Ch. 131. There the Bolivian Minister had submitted himself to the jurisdiction of the court up to the point where a summons was issued for leave to proceed to execution. At that point he asserted his diplomatic immunity. Mr. Justice Eve held the plea good but added, p. 139, ' I think the proper course is to make no order on the summons except that it do stand over generally, with liberty to restore in the event of the defendant ceasing to hold an office to which the immunity he asserts is attached.' The minister having ceased his functions, the order was subsequently restored. *Suarez* v. *Suarez* [1918] 1 Ch. 176.

" Though it is probably unimportant, I see no reason for the application here of the rule that extends an ambassador's immunity for the time reasonably necessary to permit him to depart after loss of status. The purpose of that rule is to protect him against the service of process until he gets away. Here he needs no protection against the prosecution of the pending action until he gets away. On the contrary prosecution of the action while he is here is more favorable to him than prosecution after he has left.

" The motion is therefore granted to the extent of staying the action for such time and only for such time as defendant retains his status as Alternate Resident Representative of the Republic of Venezuela to the United Nations with the rank of Envoy Extraordinary and Minister Plenipotentiary.

" Defendant's motion to dismiss on the ground of failure to state a claim was not briefed or argued and it is denied without prejudice to renewal, if and when the prosecution of this action is resumed. A separate disposition of defendant's motion to stay the taking of depositions is unnecessary since all proceedings including the taking of depositions have been stayed by the direction in the preceding paragraph."

[Reports: 145 F.Supp. 464; affirmed *per curiam*, 244 F.2d 958 (1957).]

NOTE.—The decision of the District Court has been noted in *Notre Dame Lawyer*, 32 (1957), p. 530.

Consuls—Privileges and Immunities of—Exemption from Local Jurisdiction—Acts in Performance of Official Functions—What Constitutes Such Acts—The Law of France.

BOYER AND ANOTHER *v.* ALDRETE.

France, Tribunal Civil de Marseille. October 18, 1956.

THE FACTS.—The plaintiffs brought an action for libel against Mr. Julio M. Aldrete, Consul of the Republic of Panama in Marseilles. In support of their case they produced a cutting from a Panamanian newspaper which contained a letter written by the defendant which was defamatory of the plaintiffs. The defendant did not appear.

Held: that the defendant was exempt from the jurisdiction of the Court. The defendant's letter, as reproduced in the newspaper cutting, stated that it was written in the defendant's " capacity as Consul-General of Panama in Marseilles ". It must therefore be taken as having been written in the performance of the defendant's official functions, and the Court was accordingly not entitled to exercise jurisdiction.

The Court said: " The plaintiffs claim damages for injury alleged to have been sustained by them by reason of the publicaton of an article in the Panamanian newspaper *La Nación* which they consider to be defamatory. In support of their claim they have produced a copy of the paper published in Panama on Saturday, May 12, 1956, which contains an article entitled. . . . The article reproduces *in extenso* a letter addressed to the Editor of the paper by Mr. Julio M. Aldrete, Consul-General of Panama in Marseilles. The signature of the sender of this letter, which is followed by the official description ' Consul-General of Panama in Marseilles ', leads us to assume that the writer intended to act in that capacity. The letter shows that the second paragraph begins with the words ' in my capacity as Consul-General of Panama in Marseilles '. The third paragraph begins with the words ' in the exercise of my consular functions I have made close investigation, etc.' The fourth paragraph contains the following sentence: 'Paul Boyer, former owner of a laboratory producing perfumes, who was made bankrupt in 1949 and changed his name to Professor Belvefer, as appears from the documents in the archives of the Consulate of which I am in charge'. The sixth paragraph contains the following passage: 'I only wish to safeguard my responsibility as consular agent in the exercise of my functions as I have certified the documents which prove the authority of the product . . .'. The wording of the letter shows that Mr. Aldrete, when causing the letter to be published in the press of his country, intended to act in the exercise of his functions as Consul-General of Panama. The French courts are not competent to adjudicate upon acts performed by foreign consuls in exercise of their functions. This absolute lack of competence would still obtain even if the acts of a foreign consul were *ultra vires*. Only the courts of the country which the Consul represents are competent to deal with such abuse of power. The Court must therefore declare itself incompetent *ex officio* to deal with the plaintiffs' claim because the acts complained of were committed by Aldrete in his capacity as Consul-General of the Republic of Panama in the exercise, or in connection with the exercise, of his consular functions in Marseilles."

[Report: *Gazette du Palais*, November 17-20, 1956.]

Consuls—Privileges and Immunities of—*De Facto* Exercise of Diplomatic and Consular Functions by Consular Official to Whom Exequatur Has Been Denied—Need for Notification to Ministry of Foreign Affairs—The Law of Denmark.

In re BJØRNSSON.

Denmark, Lower Court of Copenhagen. November 2, 1954.

Eastern Provincial Court. January 13, 1955.

Supreme Court. December 17, 1956.

THE FACTS.—The defendant, an Icelandic citizen, who was attached to the Icelandic Legation in Copenhagen as a member of the staff, was charged with an offence against the Danish Exchange Control Act. In order to secure evidence, the Director of Prosecutions applied to the Court for an order for the attachment of some private documents belonging to the defendant and found in his private residence. The defendant had been domiciled in Denmark since 1929. From 1932 to 1945 he served as a Secretary in the Icelandic Cabinet Secretariat in Copenhagen. In June 1952 he was appointed Icelandic Consul in Copenhagen. The Danish Ministry of Foreign Affairs, however, refused to issue an exequatur to him on the ground that in 1951 he had been fined for contravention of the Danish Tariff Act, and orally informed the Ambassador of Iceland of its refusal. Nevertheless, since 1952 the defendant had been attached to the Legation as a member of the staff and he performed in the Legation the activities normally assigned to a consul. Until December 31, 1954, the defendant was not paid any salary; after that date he received a salary of some 27,360 Icelandic crowns per year, his working hours being equivalent to the hours normally fixed for the staff. No notification was ever given to the Danish Ministry of Foreign Affairs of the position of the defendant as an official of the legation. The defendant had been made liable for taxes.

The defendant contended that, as a member of the staff of the Icelandic Legation, he was entitled to diplomatic immunity. In support of his plea he alleged that his activities in the Legation had been known to the Danish Ministry of Foreign Affairs, who had raised no objection to them. The fact, therefore, that in his case the Icelandic Legation had not observed the general practice of notifying the Ministry of Foreign Affairs of the members of the staff did not constitute a reason for not according him diplomatic immunity. He consequently refused to submit to the jurisdiction, citing in support Article 12 of the Danish Penal Code.

Held (by the Lower Court of Copenhagen): that the defendant was not entitled to diplomatic immunity. The documents in question were ordered to be attached.

The Court said: " The defendant has not been notified to the Danish Ministry of Foreign Affairs as a member of the staff of the Icelandic Legation. According to a letter of May 15, 1954, from the Danish Ministry of Foreign Affairs to this Court, such notification is required by the established Danish practice as a condition for conceding to officials of a foreign Government the privilege of exterritoriality. Nor is the defendant, who has been refused an exequatur as Consul of Iceland, in a position to plead a tacit consent to his acting as a diplomatic official. That being so, it cannot be assumed that the defendant is entitled to diplomatic immunity, including exemption from criminal prosecution, on the sole ground that he works in the Legation. Accordingly, and seeing that the documents in question are in the defendant's private residence, the said documents must be attached as evidence in the case, pursuant to Article 745 of the Act of Procedure."

On appeal by the defendant,

Held (by the Eastern Provincial Court): that the appeal must fail.

The Court said: " The evidence produced before this Court does not lead to a different conclusion. The decision of the Court below must be upheld according to the grounds therein stated."

The defendant appealed, by special leave, to the Supreme Court. In addition to the evidence given before the lower Courts, the Ambassador of Iceland in a letter to the Supreme Court submitted certain further particulars, namely: Owing to the fact that he had been refused an exequatur, the activities of the appellant in the Legation had not comprised consular business of an official character. Furthermore, with regard to the non-compliance, for a number of years, with the practice of notification, two of the secretaries employed in the Legation had not been notified to the Danish Ministry of Foreign Affairs, and similarly no notification to the Ministry had been given regarding a typist who had been employed in the Legation for the past ten years. However, none of these three persons had ever been regarded as liable to taxation.

Held (by the Supreme Court): that the decision of the Court below must be upheld.

The Court said: " Considering that the appellant has been refused an exequatur as a consul, and having regard to his situation in other respects, it appears in any event to be an obvious possibility that the Danish Ministry of Foreign Affairs, had the question been submitted to it, would likewise have refused to confer diplomatic immunity on the appellant. In these circumstances the status of the appellant ought to have been established by a notification to the Ministry of Foreign Affairs. This not having been done, the appellant is not warranted in claiming exemption from the jurisdiction."

[Reports: *Højesteretstidende*, 1956, p. 951; *Ugeskrift for Retsvæsen*, 1957, p. 126.]

Consuls—Privileges and Immunities of—Immunity from Jurisdiction—Honorary Consuls—Whether Within Original Jurisdiction of Supreme Court of Argentina.

Re Ruiz.

Argentina, Supreme Court. August 31, 1956.

The Facts.—Cándido Ruiz, claiming to be a Vice-Consul of Spain in Argentina, sought to have an action to which he was party removed from a federal district court to the Supreme Court, which has original jurisdiction over actions concerning ambassadors, ministers, and foreign consuls.[1] In a report to the Supreme Court, the Procurator General pointed out that in previous decisions the Court had distinguished between " consular officers of career " and persons designated as honorary consuls and consular agents whose official duties were incidental to their normal professional activity and who might be nationals of either the receiving State or the sending State. In the opinion of the Procurator General, because of the status of the petitioner as an honorary consular agent, it was not necessary for the Court to determine whether the action which the petitioner sought to have removed to the Supreme Court involved a question arising out of the performance of his official duties.

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[1] This provision regarding the original jurisdiction of the Supreme Court appears in Article 101 of the Constitution of 1853 (*Anales de Legislación Argentina*, 1852–1880, p. 79) and in Article 96 of the Constitution of 1949 (*Anales de Legislación Argentina*, IX–A, p. 18).

Held: that the petition must be denied. The original jurisdiction of the Supreme Court covers actions involving diplomatic and consular representatives; an honorary consular agent does not come within that classification.

The Court said: " Cándido Ruiz has pleaded that he represents the Spanish Embassy as Vice-Consul at Ayacucho (Province of Buenos Aires). According to a note which has been received from the Spanish Embassy, however, and which has been included in the record, Ruiz actually holds the post of " honorary consular agent ' of Spain in the said city.

" When this type of dispute first came before the Supreme Court the Court equated foreign consular agents to the status of vice-consuls (*Fallos de la Corte Suprema*, vol. 20, p. 357; vol. 34, p. 249).[1] In the course of time a distinction was made in this classification so that the jurisdiction of the federal courts no longer extended to honorary consular agents (*Fallos de la Corte Suprema*, vol. 179, p. 423).[2] According to the classification of foreign service officers contained in Law No. 12.951,[3] the lowest rank is that of vice-consul (see Article 2, together with the Argentine Consular Regulations promulgated under Decree No. 12.354 of May 7, 1947), and the appointment of honorary foreign service officers is prohibited (Article 82). Law No. 13.998,[4] like Law No. 48, which it modifies,[5] refers to consuls and vice-consuls in general terms which would permit the inclusion of consular agents in the latter category where, in practice, there is little difference in the nature of the duties discharged, which appears to be the situation in the instant case. There is no inherent contradiction, then, in considering that these agents are subject to the provisions of Article 55, para. (*c*), of Law No. 13.998,[6] which places without exception all controversies concerning foreign vice-consuls within the jurisdiction of the federal district courts, as distinguished from the provision regarding consuls which appears in Article 24, para. 1, of the same Law. On the contrary, it would not be possible to apply to these agents the norms established for consuls without attributing to them a status which has clearly been denied to them in law.

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[1] *Muñoz, Lara and Co.* v. *Domingo Garbino*, decided on October 10, 1878; *Domingo Garbino* v. *José Costa*, September 6, 1888.

[2] *Mario Cardile* v. *Amílcar Bresso et Al.*, December 29, 1937.

[3] *Anales de Legislación Argentina*, VII, p. 204.

[4] *Anales de Legislación Argentina*, X–A, p. 221.

[5] *Anales de Legislación Argentina*, 1852–1880, p. 364.

[6] This clause provides that Federal Judges, who are to be known under the terms of this 1950 statute as " national judges of first instance for provinces and territories ", shall have jurisdiction over " those cases concerning the private acts of foreign consuls and over all cases concerning foreign vice-consuls."

"For these reasons, and in consideration of the opinion on the case which was submitted to the Court by the Procurator General, we hold that this case does not fall within the original jurisdiction of the Supreme Court. The case must be remanded to the federal district court in Azul."[1]

[Report: *Fallos de la Corte Suprema*, vol. 235, p. 720.]

Consuls—Privileges and Immunities of—Immunity from Jurisdiction of Courts of Receiving State—Acts of a Private Law Nature —Original Jurisdiction of Supreme Court of Argentina.

SEGURA *ET AL. v.* CONSULATE OF BRAZIL AT BAHÍA BLANCA.

Argentina, Supreme Court. December 5, 1956.

THE FACTS.—The plaintiffs sought to terminate the lease of premises occupied by the Brazilian Consulate at Bahía Blanca. The suit was directed against the Consulate rather than the person of the Consul, and was brought in the Supreme Court sitting as a court of first instance.[2]

Held: that the Supreme Court lacked jurisdiction over the action. The original jurisdiction of the Supreme Court did not extend to actions concerning matters of a private nature to which foreign consular officers were party.

The Court said: "The plaintiffs, relying upon Article 26 of Law No. 13.581,[3] have sought to evict the Brazilian Consulate at Bahía Blanca from the premises which it occupies under terms of a lease which was entered into by the Vice-Consul and later renewed by the Consul.

"During the time when Article 1, para. 4, and Article 2, para. 3, of Law No. 48[4] were in force, the Supreme Court took the position that these Articles, as well as Articles 100 and 101 of the Constitution,[5] should be interpreted so as to exclude from the original jurisdiction of the Court suits which do not involve questions relating to the public functions of consuls (*Fallos de la Corte Suprema*, vol. 137, p. 23; vol. 137, p. 73; vol. 178, p. 433).[1] The relevant provisions of Law No. 13.998 (*i.e.*, Article 24, para. 1 (*d*), and Article 55, para. (*c*))[2] do not necessitate any change in this interpretation. We are not faced in the present case with any question arising out of the exercise of the official functions of a consul, such as the protection of the persons, interests or property of nationals of his country, or acts of a notarial or administrative character, or any other acts characteristic of this office. Instead, we are presented with a question concerning a *private act* of a consul; this type of question may not be brought before the Supreme Court sitting as a court of first instance."[3]

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[1] This case is also reported, with an editorial note by "Próculo", in *Revista Jurídica Argentina La Ley*, vol. 86 (April–June 1957), p. 143.

[2] Articles 100 and 101, Constitution of 1853 (*Anales de Legislación Argentina*, 1852–1880, p. 79); Article 24, para. 1, of Law No. 13,998 (*Anales de Legislación Argentina*, X–A, p. 221).

[3] *Anales de Legislación Argentina*, XIV–A, p. 157.

[4] *Anales de Legislación Argentina*, 1852–1880, p. 364.

[5] See *supra*, n. 2.

[Report: *Revista Jurídica Argentina La Ley*, vol. 88 (October-December 1957), p. 25.]

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[1] *Solveyra* v. *Ospina* (August 9, 1922), *Ospina* v. *Solveyra et Al.* (August 22, 1922): see *Annual Digest*, 1919–1922, p. 308; *Vera y Giménez* v. *Antonio Luis Serrano y Contreras* (September 24, 1937): see *Annual Digest*, 1935–1937, Case No. 190.

[2] *Anales de Legislación Argentina*, X–A, p. 221.

[3] This case is reported with an editorial note by " Próculo ", in which it is pointed out, *inter alia*, that " . . . the original jurisdiction of the [Supreme] Court relative to consuls is determined *ratione materiae* while *federal* jurisdiction [*i.e.*, original jurisdiction of federal district courts over consuls] is determined *ratione personae*."

PART VIII

TREATIES

A—IN GENERAL

II.—Forms of International Agreements

Treaties. Conventions. Governmental Agreements. Exchanges of Notes. Other Forms of Treaties.

Treaties—Kinds of—Administrative Agreement Under Security Treaty of 1925 between United States of America and Japan—Distinguished from Treaty for Purposes of Constitutional Law.

See p. 264 (*Japan* v. *Cheney*).

Treaties—Kinds of—Inter-Allied Declaration of 1943 against Acts of Dispossession in Territories under Enemy Occupation or Control—Whether Amounting to a Treaty.

See p. 810 (*N.V. De Bataafsche Petroleum Maatschappij and Others* v. *The War Damage Commission*).

Treaties—Forms of—Treaties and Agreements—The Law of Mexico.

See p. 486 (*Bautista* v. *Martinez*).

B—CONCLUSION AND OPERATION OF TREATIES

VI.—Ratification of Treaties. Entry into Force

Treaties—Ratification of—Article in Treaty Subject to Ratification to Come Provisionally into Immediate Force—Retroactive Effect of Subsequent Ratification.

See p. 632 (*Lighthouses Arbitration between France and Greece—Counterclaim to Claim No. 4*).

VII.—Operation and Enforcement of Treaties. Necessity for Municipal Legislation

[*See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

Treaties—Operation of—Effect in Municipal Law of Subsequently Enacted Statute—" Treaty Merchants "—Admission for Permanent Residence—Eligibility for Naturalization—The Law of the United States of America.

HING LOWE *v.* UNITED STATES.

United States, Court of Appeals, Ninth Circuit. March 5, 1956.

THE FACTS.—Hing Lowe, a citizen of China, filed a petition for naturalization. He had entered the United States as a visitor in 1926 and in 1928 had changed his status administratively from that of a visitor to that of a " treaty merchant ". Article II of the Treaty between the United States and China concerning Immigration signed at Peking on November 17, 1880 (22 Stat. 826, T.S. No. 49), provided:

> " Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, and privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

Section 15 of the Immigration Act of 1924, 43 Stat. 162, modified the status of Chinese who came as treaty merchants after 1924, when that Act became effective, from that of entry for permanent residence to that of temporary residence.

The petition for naturalization was denied by the United States District Court for the District of Hawaii.

On appeal,

Held: that the judgment of the Court below denying the petition for naturalization must be affirmed. A treaty may be modified by a subsequent Act of Congress.

The Court said: ". . . The only question presented is whether Lowe was lawfully admitted to the United States for permanent residence. When he changed his status from a visitor to a treaty merchant administratively, without leaving the country and making a new entry, did he acquire permanent residence for naturalization in compliance with the provisions of 8 U.S.C.A. § 1429 ?

" The determination of whether the appellant was or was not lawfully admitted to the United States for permanent residence turns on whether or not he falls under the terms of Article II of the Treaty of Nov. 17, 1880 between the United States and China, 22 Stat. 827.

"Chinese merchants prior to the effective date of the Act of 1924, under the terms of this Treaty, are in the United States for permanent residence. *Cheung Sum Shee* v. *Nagle*, 1925, 268 U.S. 336, 45 S.Ct. 539, 69 L.Ed. 985,[1] *United States* v. *Gue Lim*, 176 U.S. 459, 20 S.Ct. 415, 44 L.Ed. 544; *Haff* v. *Yung Poy*, 9 Cir., 1933, 68 F.2d 203.

"The Immigration Act of 1924, § 15, 8 U.S.C.A. § 215,[2] however, modified the status of Chinese who came as treaty merchants after the Act of 1924, from that of entry for permanent residence to that of temporary residence. *United States* v. *Kwan Shun Yue*, 9 Cir., 1952, 194 F.2d 225. Section 15 of the Act provides that a treaty merchant entering the United States was subject to regulations as to time of stay and as to the giving of bond: '. . . to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States'.

"The Act of 1924 also provided:

> Section 13 (c):[3] 'No alien ineligible to citizenship [Chinese were only made eligible in 1943 by amendment to § 303 of the Nationality Act of 1940, 8 U.S.C.A. § 703] shall be admitted to the United States unless such alien . . . (3) is not an immigrant as defined in section 3.'
>
> Section 3:[4] 'When used in this Act the term "immigrant" means any alien departing from any place outside the United States, destined for the United States, except . . . (6) an alien entitled to enter the United States solely to carry on trade . . . .'

"There is no doubt that a treaty may be modified by a subsequent act of Congress. *Clark* v. *Allen*, 1947, 331 U.S. 503, 508–509, 67 S.Ct. 1431, 91 L.Ed. 1633;[5] *Head Money Cases* (*Edye* v. *Robertson*), 1884, 112 U.S. 580, 597–599, 5 S.Ct. 247, 28 L.Ed. 798; *Moser* v. *United States*, 1951, 341 U.S. 41–45, 71 S.Ct. 553, 95 L.Ed. 729.

"Although the appellant first arrived in the United States in 1926 this fact in itself is not controlling. See *e.g. Petition of Wong Choon Hoi*, D.C.S.D. Cal.1947, 71 F.Supp. 160; *Ex parte Goon Dip*, D.C.W.D.Wash.1924, 1 F.2d 811; *Cheung Sum Shee* v. *Nagle*, 1925, 268 U.S. 336, 45 S.Ct. 539, 69 L.Ed. 985; *In re Chi Yan Cham Louie*, D.C.W.D.Wash.1946, 70 F.Supp. 493;[6] *United States* v. *Kwai Tim Tom*, 9 Cir., 1953, 201 F.2d 595, where the date of entry is related back to a time prior to 1924. Here, however, the petitioner's first status was governed by the Immigration Act of 1924 and his changed status remained governed by the same Act. A treaty merchant entering the United States after the effective date of the Immigration Act of 1924 does not enter as an immigrant and cannot be naturalized. *United States* v. *Kwan Shun Yue*, 9 Cir., 1952, 194 F.2d 225. . . ."

[Report: 230 F.2d 664.]

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[1] [See *Annual Digest*, 1925–1926, Case No. 26.]

[2] Now 8 U.S.C.A. §§ 1102, 1184, 1251 (e).

[3] Now 8 U.S.C.A. § 1182 (a).

[4] Now 8 U.S.C.A. § 1101 (a) (15) (E).

[5] [See *Annual Digest*, 1947, Case No. 82.]

[6] [*Ibid.*, 1946, Case No. 83.]

Treaties—Operation and Enforcement of—Necessity for Municipal Legislation—Whether Treaty Creates Obligations for Individuals —Non-self-executing Agreement.

UNITED STATES *v.* EKENSTAM *ET AL.*

United States, Court of Military Appeals. June 22, 1956.

THE FACTS.—The accused, personnel of the United States Navy based in Japan, were individually charged with violation of Article 134 (acts prejudicial to good order and discipline and crimes and offences not elsewhere specifically provided for) of the United States Uniform Code of Military Justice (64 Stat. 108, 50 U.S.C. § 728), in that they had purchased certain articles from United States " non-appropriated fund organizations " in Japan and had resold them to unauthorized persons, in violation of Article XV of the " Administrative Agreement under Article III of the Security Treaty between the United States and Japan ", signed at Tokyo on February 28, 1952 (3 U.S.T. 3341, T.I.A.S. No. 2492). This Agreement provided that certain Navy exchanges, social clubs, post exchanges, and other " non-appropriated fund organizations " would be exempt from Japanese regulation and from taxes, fees, and similar charges. Paragraph 3 of Article XV provides:

> " 3. Except as such disposal may be authorized by the United States and Japanese authorities in accordance with mutually agreed conditions, goods which are sold by such organizations shall not be disposed of in Japan to persons not authorized to make purchases from such organizations."

Each accused entered a plea of guilty and was convicted by a court-martial. A Board of Review of the Armed Forces set aside the convictions in each case and dismissed the indictments for failure to allege an offence punishable under the Uniform Code of Military Justice. The cases were consolidated, and the question was certified to the Court of Military Appeals whether the specifications alleged an offence.

The United States contended that Article IV of the Agreement was self-executing and, without implementing regulations, created duties for United States personnel. The accused maintained that the Article was intended to establish duties solely for the signatory Governments.

On appeal,

Held: that the decision of the board of review must be affirmed. Article XV of the Administrative Agreement concerned the relationship of the signatory Governments only and did not prescribe the conduct of individuals or organizations subject to the jurisdiction of either Government. Even if the Article were construed to create wider obligations, the Article would apply to organizations and not to individuals.

The Court said: ". . . In our opinion, the Administrative Agreement is intended to define the rights and obligations of the signatory Governments, not to prescribe the conduct of individuals or organizations subject to their authority. See *The Over the Top*, 5 F.2d 838, 845 (D.Conn.) (1925),[1] *Oppenheim's International Law*, Lauterpacht's 8th ed, § 520, page 924. However, even if the Administrative Agreement were to be so construed, Article XV applies to organizations, not to persons; consequently, that article does not prohibit the conduct alleged in the specifications. . . ."

In a separate concurring opinion, Latimer J. said: ". . . As I interpret the language used, the Agreement is intended primarily to fix with certainty the practical administrative arrangements previously agreed upon between the two contracting countries. Therefore, unless it can clearly be extended in its operation to citizens of the United States, including these accused, and thereby place on them a duty to refrain from violating any of its provisions, these convictions must be set aside. . . .

" Narrowing further the issue, I proceed to the heart of the controversy. The parties to this trial are divided over the interpretation to be placed on paragraph 8 above, and, as quite often happens, they both use the same rule of construction to support their position. This rule is set out in Hackworth, *Digest of International Law*, § 493, and I quote his language:

' Words and phrases in treaties are to be given their usual meaning unless a contrary purpose is evinced by the context of the treaty or other evidence. A reasonable, as distinguished from a restricted or technical, construction is the usual practice. All words of the treaty are, if reasonably possible, to be given a meaning, and rules of construction may not be resorted to in order to render them meaningless.'

" In applying the above-quoted rule to the facts of this case, the accused contend that the phrase ' goods which are sold by such organizations shall not be disposed of in Japan to persons not authorized to make purchases from such organizations ' must be interpreted to apply only to nonappropriated fund organizations. On the other hand, the Government insists that the phrase must be construed as a proscription against unauthorized sales by both nonappropriated fund organizations and those persons subject to the Code who purchase therefrom.

" I support the contention advanced by the accused. In interpreting the critical paragraph I am impressed by the absence of any prohibition directed particularly towards purchasers from nonappropriated fund organizations. The whole Article is worded in such a way as to disclose that organizations, not individuals, were given primary consideration. The first paragraph authorizes their establishment and limits their location. It goes on to provide that they will not be subject to Japanese regulations, license, taxes

[1] See *Annual Digest*, 1925–1926, Case No. 107.]

or control. Most assuredly those provisions are not intended to embrace persons. Paragraph 3 seems to be no more than a limitation placed upon the agencies dealt with in the previous paragraphs. When the Article is considered in its true relationship with all parts of the Agreement, it appears to me to say that those organizations which are maintained for the benefit of the United States Armed Forces, and which are not required to contribute to the support of the local government, shall not enter into competition with other taxpaying businesses by selling their goods, wares and merchandise on the open market. Had the United States Government, as one contracting party, sought to make the contract broad enough to cover the resale of merchandise purchased from the exempted activities, it would have been a very simple task to have so stated. Undoubtedly the Agreement is silent because the draftsmen contemplated that the usual orders, circulars and directives would be issued by the various departments of the respective Governments, and that it was not necessary to make the administrative document a wholly self-executing instrument.

" Article XV should not be considered as an isolated portion of the Administrative Agreement, but as part and parcel of a complete contract. All parts should be construed with reference to each other, and in construing this particular paragraph, I believe it logical to assume that the parties intended to be consistent in their use of words and phrases. Therefore, if third parties are specifically mentioned in certain provisions and admitted in others, I would conclude that the enumeration was deliberate and for the purpose of having the provisions applied differently. It is to be remembered that the Government is seeking to make a criminal statute out of Article XV, and assuming it reaches that level a penal law ought not to be extended to persons or acts not within its descriptive terms or the fair and clear import of the language used. There are several Articles in the Agreement which cast some light on my conclusion that Article XV does not create a crime.

" Article XI covers customs procedures, taxes and exemptions. Generally speaking, it provides exemptions for materials, supplies, and equipment imported by the United States armed forces. It, however, goes further, and in paragraph 3 provides that property consigned to and for the personal use of members of the United States armed forces, the civilian component, and their dependents, shall be subject to customs duties and other such charges, except that no duties or charges shall be paid with respect to certain enumerated personal property, particularly furniture, household goods, clothing and automobiles for private use. It is to be noted that in that Article the contracting parties deal specifically with both nonappropriated fund organizations and individuals, and for good reason. There the individual is granted particular benefits or privileges, and with these go corresponding obligations.

" Paragraph 6 of Article XI contains substantially the same exception as paragraph 2 of Article XV for it provides:

> ' Except as such disposal may be authorized by the Japanese and United States authorities in accordance with mutually agreed conditions, goods imported into Japan free of duty shall not be disposed of in Japan to persons not entitled to import such goods free of duty.'

Under that paragraph, I would conclude that the contracting parties clearly intended to impose on those who took advantage of the right to import property free of duty the obligation not to sell the property in Japan. But obviously the inclusion of third persons is clearly within the terms used. In addition, it is interesting to note that paragraph 8 of that Article provides:

> ' The United States armed forces, in cooperation with Japanese authorities, shall take such steps as are necessary to prevent abuse of privileges granted to the United States armed forces, members of such forces, the civilian component, and their dependents in accordance with their Article.'

" The language of that paragraph speaks out clearly to the effect that individuals may violate the Agreement, for it provides that the United States armed forces, in cooperatoin with Japanese authorities, shall take any necessary action to prevent abuse of the privileges granted to members of such forces, the civilian component, and their dependents. Its extension to individuals becomes more certain when consideration is given to the further requirement that, in order to prevent offenses against custom, laws and regulations by any member of the above-enumerated classes, the United States armed forces must render all assistance within their power to insure the payment of duties, taxes, and penalties payable by members of such forces, or of the civilian component, or their dependents.

" Again, in Article XII of the Agreement, the two contracting Governments agree that the United States shall have the right to obtain material, supplies, and equipment, exempt from certain Japanese taxes. That Article also mentions individuals as it provides that ' Neither members of the United States armed forces, civilian component, nor their dependents, shall by reason of this Article enjoy any exemption from taxes or similar charges.' Paragraph 8 of the Article goes on to state:

> ' Except as such disposal may be authorized by the Japanese and United States authorities in accordance with mutually agreed conditions, goods purchased in Japan exempt from the taxes referred to in paragraph 3, shall not be disposed of in Japan to persons not entitled to purchase such goods exempt from such tax.'

" In this instance third parties are mentioned only for the purpose of making certain that they acquire no privileges or benefits. Therefore, the prohibition against resale seems to me to run only against property lawfully acquired by the United States Government or its agencies.

" Returning to Article XV and considering it in the light of the other provisions of the Agreement, I find it does not specifically grant privileges to, or fix duties on, members of the United States armed forces, the civilian component, or their dependents. It deals entirely with the establishment of exchanges, messes, social clubs, theaters, newspapers and other nonappropriated fund organizations. Those organizations are granted tax free privileges and they are not shackled with Japanese regulations. They are required to furnish information on such matters as sales taxes, conditions of employment, and other matters, and they are obligated to comply with Japanese tax legislation in certain fields. If there are any penal sanctions created by this Article, the punishment ought to be directed towards those organizations who are permitted to operate under the preferred conditions set out in the Agreement. Throughout the Article only those nonappropriated fund activities which are the beneficiaries of the Agreement are mentioned, and I am not disposed to construe its provisions to extend to enumerated classes of persons. As to post exchanges, messes and other organizations, the contract may be self-executing—a matter I need not decide—but any penal consequences of the violation of the paragraph cannot be extended to purchasers from those activities. They can only be reached by implementing regulations. . . ."

[Reports: 7 U.S.C.M.A. 168; 21 C.M.R. 294.]

Treaties—Operation of—Necessity for Municipal Legislation—The Law of Canada—Effect of War on Operation of Treaty.

FRANCIS *v.* THE QUEEN.

Canada, Supreme Court. June 11, 1956.

(Kerwin C.J.C.; Taschereau, Rand, Kellock, Cartwright, Fauteux and Abbott JJ.)

THE FACTS.—This was an appeal against a decision of Cameron J., in the Exchequer Court,[1] dismissing the petition of right of the appellant, an Indian resident at all material times on the St. Regis Indian Reserve in Quebec. This Reserve is part of a larger settlement of the St. Regis Tribe extending into the United States of America and is bounded on the south by the international boundary between Canada and the United States. Between 1948 and 1951 the appellant, Francis, purchased an electric washing machine, an oil burner and an electric refrigerator in the United States; two of these were brought over or from the international boundary to his home in the reserve by Francis, and the other was delivered by the seller. They were not reported at the customs office for the district, and some time later they were seized and held until the duty amounting to $123.66 was paid. The petition of right was thereupon brought for the return of these monies.

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[1] [1955] 4 D.L.R. 760; [1954] Ex. C.R. 590: see *International Law Reports*, 1955, p. 591.

The first ground of appeal was based on Article III of the Treaty of Amity, Commerce and Navigation between His Britannic Majesty and the United States of America, signed on November 19, 1794 (hereinafter referred to as the Jay Treaty),[1] taken together with Article IX of the Treaty of Ghent, 1814,[2] between the same parties. Article III of the Jay Treaty provides:

> " No duty on entry shall ever be levied by either party on peltries brought by land or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians."

Article IX of the Treaty of Ghent, as far as it concerns Great Britain, reads:

> " And His Britannic Majesty engages, on his part, to put an end immediately after the ratification of the present treaty to hostilities with all the tribes or nations of Indians with whom he may be at war at the time of such ratification, and forthwith to restore to such tribes or nations respectively all the possessions, rights and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities: Provided always that such tribes or nations shall agree to desist from all hostilities against his Britannic Majesty, and his subjects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly."

The contention based on these articles was as follows: Article III effected the enactment of substantive law not requiring statutory confirmation as being a provision in a treaty of peace, the making of which was in the exercise of the prerogative, including, here, a legislative function; on the true interpretation of the Treaty the Article was intended to be perpetual and was not affected by the war of 1812; in any event it was restored by Article IX of the Treaty of Ghent.

A second ground of appeal was that the appellant was exempted from liability for the duties by s. 102 of the Indian Act (R.S.C. 1927, c. 98) and by s. 86 (1) of R.S.C. 1952, c. 149. These read:

> " 102. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds, in his individual right, real estate under a lease or in fee simple, or personal property outside of the reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate."

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[1] *British and Foreign State Papers* (1812–1814), Part 1, p. 784.

[2] *Ibid.* (1814–1815), Vol. 2, p. 357.

> "86 (1). Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 82, the following property is exempt from taxation, namely,
>
> (*a*) the interest of an Indian or a band in reserve or surrendered lands, and
>
> (*b*) the personal property of an Indian or band situated on a reserve,
>
> and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property."

Held: that the appeal must be dismissed. The Jay Treaty required implementing legislation to make it effective in Canadian Courts, and in the absence of such legislation Article III of the Jay Treaty did not confer any exemption from customs duties.

Kerwin C.J.C. (with whom Taschereau and Fauteux JJ. concurred) stated the facts, and continued: "The Jay Treaty was not a treaty of peace and it is clear that in Canada such rights and privileges as are here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation. This is an adaptation of the language of Lamont J., speaking for himself and Cannon J. in *Re Arrow River and Tributaries Slide and Boom Co.*, [1932], 2 D.L.R. 250, S.C.R. 595, 39 C.R.C. 161,[1] and is justified by a continuous line of authority in England. Although it may be necessary in connection with other matters to consider in the future the judgment of the Judicial Committee in the *Labour Conventions Case* [*Reference re Weekly Rest in Industrial Undertakings Act, etc.*], [1932], 1 D.L.R. 673, A.C. 326, so far as the point under discussion is concerned it is there put in the same sense by Lord Atkin. It has been held that no rights under a treaty of cession can be enforced in the Courts except in so far as they have been incorporated in municipal law: *Vajesingji Joravarsingji* v. *Secretary of State for India* (1924), L.R. 51 Ind. App. 357; *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 308.[2] The case of *Sutton* v. *Sutton* (1830), 1 Russ. & M. 663, 39 E.R. 255, relied upon by the appellant, dealt with the construction of another provision of the Jay Treaty and of the statute of 37 Geo. III., c. 97, which was passed for the purpose of carrying certain terms of the Treaty into execution. This is not a case where vested rights of property are concerned and it is unnecessary to consider the question whether the terms of the Jay Treaty were abrogated by the war of 1812.

"I agree with Cameron J. that cl. (*b*) of s. 86 (1) of the Indian Act does not apply, because customs duties are not taxes upon the personal property of an Indian situated on a Reserve but are imposed upon the importation of goods into Canada. I also agree that, so far as the refrigerator and the oil heater are concerned, s. 49 of c. 25 of the 1949 [2nd Sess.] statutes is a complete bar. That is An Act to amend the Income Tax Act and the Income War Tax Act. While it is true that in s. 48 there are references to residents in Newfoundland and in ss. 49 and 50 to Newfoundland, most of the sections deal with income tax throughout all of Canada. The words are clear that no one is entitled to any deduction, exemption or immunity from, or any privilege in respect of any duty or tax imposed by an Act of the Parliament of Canada: and the Customs Act, R.S.C. 1952, c. 58, certainly provides for a duty on all the goods brought into the country by the appellant. Counsel for the appellant points to the words ' notwithstanding any other law heretofore enacted ' and argues that the rights upon which the appellant bases his claim under the Jay Treaty do not arise under any enactment. For the reasons already given, I cannot agree that any relevant rights of the appellant within that Treaty are judiciable [*sic.*] in the Courts of this country."

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[1] See *Annual Digest*, 1931–1932, Case No. 2.]

[2] *Ibid.*, 1938–1940, Case No. 184.]

Rand J. (with whom Cartwright J. concurred), after stating the facts, said: " Cameron J., dismissing the petition, held that Article III required statutory confirmation to become effective as law, of which there was none; that the article was abrogated by the war of 1812; that the exemption was negatived by s. 49 of c. 25 of the Statutes of Canada, 1949, 2nd Session; and that the sections of the Indian Acts quoted did not extend to customs duties. Article 9 of the Treaty of Ghent was not, evidently, brought to his attention nor apparently the distinction in respect of the scope and power of the prerogative urged before us between a treaty of peace and other treaties.

" A peace treaty in its primary and legitimate meaning is a treaty concluding a war, ' an agreement '—in the words of Sir William Scott in *The Eliza Ann* (1813), 1 Dods. 244 at p. 249, 165 E.R. 1298—' to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war.' The Treaty of Paris, 1783, was of that nature; it recognized the independence of the United States, fixed boundaries, secured the property of former and continuing subjects and citizens in both countries against prosecution and against confiscation of their property, provided for the withdrawal of British troops from the lands of and border points in the United States and for other matters not germane here.

" The question of the Indians, however, was left untouched, and during the years that followed they presented both Governments with problems of reconciliation. Generally speaking, the tribes in the east between New York state and the Ohio river, and in particular those belonging to the confederation known as the Six Nations had tended to support the British, and the bitterness then aroused continued after the peace. No clear political conception had been formulated of the relationship of the Indians either to the old or the new Government especially in respect of rights in the lands over which the natives had formerly roamed at will; and their protest was that the British had purported to transfer to the United States, a title which they did not possess. As a measure of mitigation, the British conceived the idea of setting apart a neutral zone between the two countries for Indian settlement, but this did not, apparently, develop to the point of definite proposal. In addition to this, charges and countercharges were made by both countries of failure to carry out the terms of the treaty in such matters as the return of slaves, the confiscation of properties, the prosecution of individuals and the withdrawal of British troops from fortified border points. These, with the events developing in Europe and the need of both for the restoration of trade, induced a common desire to remove these frictions, which eventuated in the Treaty of 1794; (*Jay's Treaty, A Study in Commerce and Diplomacy*, Bemis, pp. 109 *et seq.*).

" Assuming then, a broader authority under the prerogative in negotiating a peace treaty, neither the causes nor the purposes of the Treaty of 1794 bring it within that category.

" A treaty is primarily an executive act establishing relationships between what are recognized as two or more independent states acting in sovereign capacities; but as will be seen, its implementation may call for both legislative and judicial action. Speaking generally, provisions that give recognition to incidents of sovereignty or deal with matters in exclusively sovereign aspects, do not require legislative confirmation; for example, the recognition of independence, the establishments of boundaries and, in a treaty of peace, the transfer of sovereignty over property, are deemed executed and the treaty becomes the muniment or evidence of the political or proprietary title. Stipulations for future social or commercial relations assume a state of peace: when peace is broken by war, by reason of the impossibility of their exercise, they are deemed to be abrogated as upon a failure of the condition on which they depend. But provisions may expressly or impliedly break in upon these general considerations; the terms may contemplate continuance or suspension during a state of war. The interpretation is according to the rules that govern that of instruments generally; from the entire circumstantial background, the nature of the matters dealt with and the objects in view, we gather the intention of the parties as expressed in the language used. When such matters touch individuals, the judicial organ must act but a result that brought about non-concurrence between the judicial and the executive branches, say as to abrogation, and apart from any question of an international adjudication, would, to say the least, be undesirable.

" Except as to diplomatic status and certain immunities and to belligerent rights, treaty provisions affecting matters within the scope of municipal law, that is, which purport to change existing law or restrict the future action of the Legislature, including, under our Constitution, the participation of the Crown, and in the absence of a constitutional provision declaring the treaty itself to be law of the state, as in the United States, must be supplemented by statutory action. An instance of the joint involvement of executive, legislative and judicial organs is shown by the provisions of the Treaty of 1873 respecting the holding of lands in the United States by subjects of Great Britain, including their heirs and assigns, and *vice versa*. These were supplemented by 37 Geo. III., c. 97, which was declared to continue so long as the treaty should do so and no longer. In *Sutton* v. *Sutton*, 1 Russ. & M. at p. 676, Sir John Leach M.R. held that this provision was not annulled by the war of 1812, that so far the statute remained in force and that ' the heirs and assigns of every American who held lands in Great Britain at the time mentioned in the Act of 37 G. 3, are, so far as regards those lands, to be treated, not as aliens, but as native subjects.'

" To the enactment of fiscal provisions, certainly in the case of a treaty not a peace treaty, the prerogative does not extend, and only by legislation can customs duties be imposed or removed or can the condition under which goods may be brought into this country be affected. I agree, therefore, with Cameron J. in holding that legislation was necessary to bring within municipal law the exemption of the clause in question. Legislation to that effect was enacted, in Upper Canada by 41 Geo. III., c. 5, s. 6, repealed by 4 Geo. IV., c. 11; in Lower Canada by the enabling statute, 36 Geo. III., c. 7, and the ordinance of 1796 made thereunder, the former having been continued by annual renewals up to January 1, 1813, when it lapsed. No legislation is suggested to have been passed by any other Province. For over a century, then, there has been no statutory provision in this country giving effect to that clause of the article.

" The particular privilege lay within a structure of settled international relations between sovereign states and from its nature was not viewed as intended to be perpetual. Following the treaty of 1783 large scale transfers of Indians belonging to the Six Nations and more western tribes took place from the United States to lands north of Lake Erie. This was a major step which was bound to affect materially the circumstances instigating the clause.

" But the Indians north of the boundary were not confined to the district between Montreal and Detroit: they inhabited also the eastern maritime Provinces and the territories to the west of central Canada; these were within the general language but there has been no suggestion that the treaty was significant to them, much less that they have ever claimed its privilege.

" In 1794 European settlement of North America was in its early stages. In 1768 a treaty had been made with the Indians that had placed the western boundary of the advance south of the Great Lakes at the Ohio river. The lands to the north and west of those lakes were within the charter granted to the Hudson's Bay Company. The section of the international boundary from the Lake of the Woods to the Rocky Mountains was not fixed until 1818 and that beyond to the Pacific until 1846. Confederation succeeded in 1867 and a few years later drew within its orbit all the territory reaching to the Pacific and the far north. Government in relation to the Indians was thus greatly extended. Continuing the administration inaugurated by Sir William Johnson in 1744 and extended to Quebec in 1763 (*Canada and Its Provinces*, vol. IV, pp. 695 *et seq.*) ordinances for the welfare of the Indians and the protection of their lands were passed in Lower Canada as early as 1777 and a partial consolidation was made in 1840 by 3–4 Vict., c. 44. In Upper Canada, 5 Wm. IV., c. 9 and 2 Vict., c. 15, provided similar safeguards. Legislation of the Province of Canada, 13–14 Vict., c. 42, 14–15 Vict., c. 106, and 20 Vict., c. 26, had in view the preservation of their settlements and their gradual introduction to the customs and mode of life of western civilization. Then 31 Vict., c. 42, committed the management of their lands to the Department of the Secretary of State and by 32–33 Vict., c. 6, comprehensive provision was made for their gradual enfranchisement and the management of their affairs. These enactments were consolidated by 43 Vict., c. 28, and this with modifications has now become the present Indian Act.

" Indian affairs generally, therefore, have for over a century been the subject of expanding administration throughout what is now the Dominion, superseding the local enactments following the treaty designed to meet an immediate urgency. In the United States the last statutory provision dealing with duties on goods brought in by Indians was repealed in 1897. This appears from the case of *United States* v. *Garrow* (1937), 88 Fed. (2d) 318 at p. 321. In that case, also, it was pointed out that under the Ghent treaty the contracting parties merely ' engaged ' themselves to restore by legislation the ' possessions, rights and privileges ' of the Indians enjoyed in 1811 but that no such enactment had been passed. The article itself was held to have been abrogated by the war of 1812: *Karnuth* v. *United States* (1928), 279 U.S. 231.[1] In the last decade of the 18th century peace had been reached between the United States and the tribes living generally between Lake Champlain and the Mississippi river. There followed the slow but inevitable march of events paralleled by that in this country; and today there remain along the border only fragmentary reminders of that past. The strike had waged over the free and ancient hunting grounds and their fruits,

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[[1] See *Annual Digest*, 1927–1928, Case No. 364.]

lands which were divided between two powers, but that life in its original mode and scope has long since disappeared.

"These considerations seem to justify the conclusion that both the Crown and Parliament of this country have treated the provisional accommodation as having been replaced by an exclusive code of new and special rights and privileges. Appreciating fully the obligation of good faith toward these wards of the state, there can be no doubt that the conditions constituting the *raison d'être* of the clause were and have been considered such as would in foreseeable time disappear. That a radical change of this nature brings about a cesser of such a treaty provision appears to be supported by the authorities available: McNair, *The Law of Treaties*, 1938, pp. 378–381. Assuming that Art. 9 of the Treaty of Ghent extended to the exemption, it was only an 'engagement' to restore which, by itself, could do no more than to revive the clause in its original treaty effect, and supplementary action was clearly envisaged. Whether, then, the time of its expiration has been reached or not it is not here necessary to decide; it is sufficient to say that there is no legislation now in force implementing the stipulation.

"There remains the question of exemption under s. 102 of R.S.C. 1927, c. 98, and s. 86 (1) of R.S.C. 1952, c. 149, the former of which was repealed as of June 20, 1951 [proclaimed September 4, 1951]. I can find nothing in these provisions that assists the appellant. To be taxed as by s. 102 'at the same rate as other persons in the locality' refers obviously and only to personal or real property under local taxation; it cannot be construed to extend to customs duties imposed on importation.

"Similarly in s. 86 (1), property 'situated on a reserve' is unequivocal and does not mean property entering this country or passing an international boundary. On the argument made, the exemption would be limited to situations in which that boundary bounded also the Reserve and would be a special indulgence to the small fraction of Indians living on such a Reserve, a consequence which itself appears to me to be a sufficient answer.

"The appeal must therefore be dismissed and with costs if demanded."

Kellock J. (with whom Abbott J. concurred) stated the facts, and continued: "The appellant contends (1) that this article[1] became part of the municipal law in Canada without the necessity of any legislation either authorizing it or confirmatory thereof, and (2) that there is no legislation subsequently enacted which affects the right claimed.

"In view of the conclusion to which I have come with respect to the second point, I do not find it necessary to consider the first. The appellant admits that at least since the Statute of Westminster

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[1] Article III of the Jay Treaty.

1931,[1] it was competent to Parliament to legislate with respect to the right claimed.

" [Kellock J. then referred to s. 86 (1) of the Indian Act,[2] and continued:] Before the property here in question could become situated on a Reserve, it had become liable to customs duty at the border. There has been no attempt to impose any other tax.

" Section 89 (1) and (2)[3] reads as follows:

> " ' 89 (1) For the purposes of sections 86 and 88, personal property that was
>
> (*a*) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indian bands, or
>
> (*b*) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,
>
> *shall be deemed always to be situated on a reserve.*
>
> " ' (2) Every transaction purporting to pass title to any property that is by this section *deemed to be situate on a reserve*, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.'

" It is quite plain from this section that the actual situation of the personal property on a Reserve is contemplated by s. 86 and that any argument suggesting a notional situation is not within the intendment of that section.

" It is, moreover, provided by s. 87 that ' Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act '.

" I think it is quite clear that ' treaty ' in this section does not extend to an international treaty such as the Jay Treaty but only to treaties with Indians which are mentioned throughout the statute.

" In my opinion the provisions of the Indian Act constitute a code governing the rights and privileges of Indians, and except to the extent that immunity from general legislation such as the Customs Act or the Customs Tariff Act is to be found in the Indian Act, the terms of such general legislation apply to Indians equally with other citizens of Canada."

[Report: [1956] 3 D.L.R. (2d) 641.]

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[1] 22 Geo. 5. c. 4.

[2] See *supra*, p. 461.

[[3] *Scil.*, of the Indian Act.]

Treaties—Operation of—Treaty in Conflict with Earlier Municipal Law—Whether Contents of Treaty Applicable If Invoked by Virtue of Most-Favoured-Nation Clause—The Law of France.

ORSO AND NARI *v.* SEVASTOPOULO.

France, Court of Cassation. October 19, 1956.

THE FACTS.—The appellants were Italian citizens whose claim to the benefits of a French Law of October 17, 1945, as amended, relating to the tenure of agricultural land, was rejected on the ground that this Law applied only to French citizens. The appellants contended, *inter alia*, that by virtue of the operation of a most-favoured-nation clause contained in the Franco-Italian Agreement of May 17, 1946, as interpreted by an Exchange of Letters between the French and Italian Governments in October and November 1948, they were entitled to the benefits of the Law of October 17, 1945, as amended.

Held: (i) that as the Agreement of May 17, 1946, did not expressly refer to the Law of October 17, 1945, as amended, it left unaffected the operation of that Law, and the appellants, as foreign nationals, were therefore excluded from its operation; and (ii) that the intrepretation of the Agreement by the subsequent Exchange of Letters was not binding on the Court because the Exchange of Letters had not been published.

The Court said: " The appeal contends that the Exchange of Letters between ambassadors and the Treaties concluded before and after the war show that Italian citizens in France and French citizens in Italy are entitled to the same treatment in each other's territory as citizens of the most-favoured-nation. The declaration of war on France by Italy is incompatible with the obligations imposed by the Treaty of June 3, 1930, on France in the matter of the establishment of Italian citizens in French territory. The armistice which suspended hostilities left in being the state of war, and the Treaty of 1930 is not contained in the list of Treaties revived by Article 44 of the Treaty of Peace of February 16, 1947. The Exchange of Letters of October 28 and November 2, 1948, which interprets the Agreement of May 17, 1946, has not been published, and accordingly cannot be binding on the courts. The Agreement of May 17, 1946, which was ratified by a Decree of August 25, 1947, and published on August 27, 1947, and which concerns the ' establishment ' of Italian citizens, although later in date than the Law of April 13, 1946 (*viz.*, the Law amending the Law of October 17, 1945), does not contain any reference to that Law or to the legislation on landlord and tenant. It cannot, therefore, be interpreted as excluding the application of Article 61 of the Law which withholds the benefits of the Law from foreigners."

[Reports: *Bulletin de la Cour de Cassation*, 1956, p. 564; *Juris-classeur périodique*, 1956, IV, p. 159.]

Treaties—Operation of—As Affecting Rights of Individuals—Peace Treaty with Austria of May 15, 1955.

EXECUTION OF JUDGMENT (AUSTRIAN PEACE TREATY) CASE.

Austria, Supreme Court. January 18, 1956.

THE FACTS.—On September 15, 1951, the appellant obtained a judgment in the Austrian courts against the former German Reich. He was desirous of levying execution against a piece of land belonging to the former Reich and situate in Austria but was unable to do so because at that time all so-called " German property " was being administered by the Occupying Powers. As a result of the coming into operation of the Peace Treaty with Austria on July 27, 1955, all " German property " vested in the Republic of Austria, and after that date the appellant applied for an executory title against the piece of land here referred to. His application was refused on the ground that, as the land was now vested in the Republic of Austria, it could no longer form the subject-matter of an executory title against the former German Reich. On appeal, it was contended on behalf of the appellant that the Treaty of Peace was applicable only between States and was of no legal effect so far as concerned the rights of individuals, and that accordingly his application for an executory title should have been granted.

Held: that the appeal must be dismissed. The Treaty of Peace had been duly ratified and published in the Federal Statutes of the Republic of Austria and its provisions were therefore applicable as municipal law and binding on individuals.

The Court said: " The Court below refused the application for an executory title because, by virtue of Article 22, para. 11, of the Peace Treaty, the German property with which this case is concerned and which on August 2, 1945, was subject to the administration of the United Kingdom of Great Britain and Ireland became the property of the Republic of Austria by operation of law, with the result that execution could be granted only against the Republic of Austria, and not against the German Reich. The contention of the appellant that the Peace Treaty contains only provisions of international law and is not applicable to matters of private law within the municipal sphere is ill-founded. The Peace Treaty concluded between the Republic of Austria and the Occupying Powers was sanctioned by Parliament and published in the Federal Statutes (No. 152 of July 30, 1954 (*sic.*)). Having regard to the positive provisions contained in Articles 49 (1) and 50 of the Constitution, the provisions of the Treaty of Peace are applicable to relations of private law within the municipal sphere. At the time when the application was made in the present case, the Peace Treaty was already in force, and Article 22, para. 11, of the Treaty is therefore applicable. It provides that all German property previously subject to the administration of the Allied Powers became the property of the Republic of Austria, by operation of law and as from the date of the coming into operation of the Treaty, without the requirement of any entry in the land register recording the transfer of ownership to the Republic of Austria. We must therefore give effect to this transfer of ownership so far as concerns the application of the law governing execution. For this purpose no further legal enactment is required. Having regard to the fact that application was made for an executory title against the German Reich when all German property situate in Austria had already vested in the Republic of Austria, and further having regard to the fact that such application was not made against the Republic of Austria, the Court below was right in refusing the application for an executory title against land which belonged to the Republic of Austria, and not to the judgment debtor. The appeal must therefore be dismissed."

[Reports: 3 Ob 11/56; ÖR, 1956, p. 63.]

Treaties—Operation of—As Affecting Individuals—Operation of Treaty After Signature but Before Entry into Force—Private Contract Concluded Before Entry of Treaty into Force—Contract Contrary to Purpose of Treaty—Whether Contract Binding—The Law of Austria.

TERMINATION OF EMPLOYMENT (AUSTRIA) CASE.

Austria, Supreme Court. May 8, 1956.

THE FACTS.—In July 1955, *viz.*, some two months after the conclusion of the Peace Treaty with Austria, one G., a person appointed manager of the defendants' business by one of the Occupying Powers, issued a directive, by agreement with the members of the works' council of the defendants, that no person in the employment of the defendants could henceforth be dismissed without the consent of the works' council. The effect of this directive was that for all practical purposes the defendants were precluded from terminating any contract of employment of their own accord. When the directive was issued the defendants' business was still subject to the control of the occupation authorities, but it was well known that within a very short time, *viz.*, within two months from the coming into operation of the Peace Treaty with Austria, the defendants' business would be freed from control. On September 9, 1955, the plaintiff, an employee of the defendants, was given two weeks' notice of termination of his employment, the notice expiring on September 23, 1955. He brought an action claiming wages in lieu of notice in respect of the week commencing September 23, 1955, his contention being that his contract had not been validly determined because the works' council had not given its consent as required by the directive issued in July 1955.

Held: that the action must be dismissed. Having regard to the imminence of the coming into operation of the Peace Treaty, the directive, which would free the defendants' business from all control, was contrary to good faith and therefore invalid.

The Court said: " The directive, which states that a person can be dismissed only with the consent of the works' council, is invalid. This directive was issued in July 1955, and it did not become operative until July 25, 1955. At that time the Peace Treaty with Austria of May 15, 1955, had long since been signed. It was therefore generally known at that time that the Soviet Union would hand back the defendants' business within a short time, *viz.*, two months after the entry into force of the Treaty. In these circumstances it was an abuse of such power as G. may have possessed to act on behalf of the defendants for him to issue a directive containing such a far-reaching and unusual provision which meant that the works' council could exercise an absolute veto against any dismissal of employees. No one has contended that there were compelling reasons which required such action to be taken, as it were, at the last moment. The members of the works' council who agreed to this directive were fully aware that this was an abuse of such powers as G. may have possessed to act on the defendants' behalf. The fact that these persons nevertheless agreed to this directive being issued by the Russian managing director, who was shortly due to relinquish his post, constituted a violation of the principle of good faith and results in the invalidity of this directive."

[Report: ÖR, 1956, p. 144.]

Treaties—Operation of—Requirement of Notification Establishing Existence of Reciprocity—Effect of—Absence of Notification—The Law of Israel.

YAHIMOVITZ *v.* RUBASHITZ.

Israel, Supreme Court (*sitting as the Court of Civil Appeals*).

(Olshan C.J.; Berenson and Vitkon JJ.)

June 26, 1956.

THE FACTS.—This was an appeal from a decision of the District Court to issue an " order of succession " relating to the division of an estate situated in France. A dispute had arisen between two of the heirs, the appellant and the respondent respectively, the appellant alleging that the dispute had been decided in her favour by an arbitration award between the two parties rendered in France in June 1952. On October 24, 1957, Israel signed the Convention on the Execution of Foreign Arbitral Awards of September 26, 1927. This was ratified on February 27, 1952, and, in accordance with Article 8, it came into force for Israel on May 27, 1952. By the

Arbitration (Foreign Awards) Ordinance, 1934, provision was made for the enforcement in Israel of arbitral awards covered by the Convention on condition that the Minister of Justice had published an appropriate notification establishing the existence of reciprocal provisions in Israel and the country in which the award was made. The District Court had decided the case on the basis that the succession was regulated by Israel law, and that the arbitral award could not be enforced in Israel.

On appeal,

Held: that the appeal must be dismissed. Since the Minister of Justice had not published an appropriate notification, and on other grounds, the Convention was not applicable and the arbitral award was not enforceable in Israel. The judgment of the Court was given by Berenson J., who said (*inter alia*):

" Neither party adduced evidence on the question of the existence of an appropriate notification. I therefore enquired of the Ministries of Justice and Foreign Affairs and was informed that as far as is known the Government of Israel has made no public notification of the application of the Convention in relation to France. Consequently, the conditions of the Ordinance are not met, and the award on which the appellant relies does not come within the scope of the Ordinance. . . ."

[Reports: *Piskei-Din*, 10 (1956), p. 1044; *Pesakim Elyonim*, 24 (1956), p. 180.]

Treaties—Operation and Enforcement of—Effect in Municipal Law—Treaty as Prevailing over Inconsistent Municipal Legislation—Arrangement concerning Notification of Judicial Process—Supremacy over Inconsistent Procedural Law of One of the Parties—Promulgation of Treaty—The Law of Egypt.

N. *v.* X.

Egypt, Court of Cassation (*Civil Chamber*). *March* 7, 1956.

(Gaber, Sayed, Wahed Ali, Etlem, Youssef JJ.)

THE FACTS.—On July 12, 1950, N. obtained in the High Court of Khartoum a judgment against X. for payment of approximately £E2,500. He later applied to the Tribunal of First Instance of Cairo for the " executory formula " to be affixed to the judgment. On June 14, 1951, the Tribunal refused to give the exequatur on the ground that the applicant had failed to comply with the requirements of the Arrangement of 1902 between Egypt and the Sudan concerning summonses and other judicial process. On appeal, the Court of Appeal of Cairo on May 8, 1952, confirmed the judgment of the Tribunal. N. appealed further, his principal contentions being:

I. The Tribunal of First Instance had wrongly applied the

Decision of May 17, 1902, of the Council of Ministers ratifying the "Arrangement" concluded between the Governments of Egypt and Sudan. It appeared from the provisions of Articles 1 and 4 of that Arrangement that each of the Governments mentioned undertook to give notice of summonses and other judicial process which might be transmitted to it for that purpose by the other Government, in the manner provided in the Arrangement. In such case, it would be for the Government receiving the documents to proceed to give notice of them in the manner prescribed in the Arrangement. The provisions of the Arrangement did not require the Government which desired to proceed to the notification of judicial proceedings in the territory of the other Government, to send the process to be notified to the other Government, but rather to proceed to the notification of the said process in the manner prescribed by its own municipal legislation. This was shown by the fact that Article 1 of the Arrangement provides: "Each of the two Governments undertakes in principle . . ." and the expression "in principle" connotes an idea of "time"; it must be so understood because the Government of the Sudan promulgated laws to regulate the notification of judicial process for persons resident outside the Sudan. Article 61 of the *Recueil des Lois* promulgated for the Sudan on May 1, 1925, provides that notification shall be sent by registered post if regular postal communication exists between the addressee and the place where the Court is situated.

II. The judgment appealed from was in error in holding that the notification of the summons and the notification of the judgment transmitted through the post to the respondent to the appeal were invalid under Article 61 of the Sudanese *Recueil des Lois*, despite the fact that the Decision of May 17, 1902, of the Council of Ministers did not provide for such invalidity as a sanction for failure to comply with the provisions of the Arrangement and even though there can be no invalidity in the absence of an express provision.

III. The judgment appealed from was contrary to the principles of private international law, and also to the provisions of Articles 491 and 493 (2) of the Code of Procedure. The appellant argues, in support of this contention, that it was in principle established in private international law that rules of procedure are governed by the law of the court which is seised of the matter. Given that the Court of Khartoum was seised of the present matter, it ought to have satisfied itself that as regards the notification it had proceeded in conformity with Sudanese municipal law. The notification of the originating process had been effected in conformity with the said law and therefore validly, and the Egyptian courts—charged with the execution of a judgment validly given—had only to verify that the notification had been given in a valid and regular manner in accordance with the law of the country of the court which gave the judgment, by application of Article 493 (2) of the Code of Procedure.

In the same way, the judgment appealed from failed to take into account the requirement of reciprocity contained in Article 491 of the Code, for the Government of the Sudan promulgated in 1901 a Law concerning the execution of judgments given by Egyptian courts, whether national or Sharia [ecclesiastical], and the last paragraph of Article 8 of that Law provides: "confirmation is required that the summons has been notified in accordance with the rules laid down by Egyptian national law". The application of the rule of reciprocity stipulated by Article 491 of the Code permitted the execution in Egypt of a judgment given by a Sudanese court so long as the writ of summons had been notified in accordance with the rules prescribed in the law of the Sudan.

IV. The Decision of the Council of Ministers of May 17, 1902, was not regarded as an instrument having the legislative force of a law, seeing that its provisions did not require each of the two Governments to follow the same system laid down for the notification of judicial process, as was shown in the first ground of appeal. Indeed, Article 23 of the Arrangement which was approved by the Decision of the Council of Ministers provides that "the Government of the Sudan will promulgate, as soon as possible, the legislative provisions necessary for the execution of the present agreement." Despite that, the Government of the Sudan did nothing in the matter until the promulgation, in May 1925, of its *Recueil de Code Civil,* Article 61 of which set out the procedure to be followed for the notification, to persons resident outside the Sudan, of judicial process, through the post, in regions where there exists a regular postal service. This showed that the Government of the Sudan did not promulgate any legislation to bring the Arrangement of 1902 into force.

If the Arrangement were regarded as a treaty, then it was still-born from the legislative point of view seeing that the Government of the Sudan did not promulgate legislation to carry out the Arrangement. Moreover, the Decision of the (Egyptian) Council of Ministers approving the Arrangement of 1902 did not give the latter the force of law, seeing that there was no decree emanating from the Head of State to put into force, as was at that time the practice for the promulgation of laws.

Held: that the appeal must fail. The judgment of the Court of Khartoum could not be enforced in Egypt because the procedure laid down in the Arrangement had not been followed. The provisions of Sudanese law could not overrule those of the Treaty.

The Court said: "All the grounds of appeal can be answered.

"The Arrangement concluded between the Government of Egypt and the Sudan, approved by the Council of Ministers on May 17, 1902, provided in Article 1 that

> " 'Each of the two Governments binds itself, in principle, to give notification of summonses and other judicial process which are transmitted to it by the other Government for that purpose.'

Similarly, Article 4 provides that

> " 'process of which notification is to be given in Egypt shall be transmitted through the Agent of the Sudan to the Ministry of Justice, who will attend to the notification through the administrative channel.'

" The term 'mabdaijan' is translated in the French text by '*en principe*' and in the English text by 'in principle', and consequently that expression does not connote an idea of time as the appellant claims. Similarly, the ground of appeal relating to Article 1 makes reference to the obligation of each of the two Governments to give notification of summonses and other judicial process transmitted to it by the other Government.

" On the other hand, Article 4 laid down the procedure to be followed for the notification of process in Egypt. The text of that Article is clear: the procedure of citation there dealt with is the only one on which the two Governments reached agreement in regard to process to be notified in Egypt. If then, the two contracting parties meant to recognize mutually the right to proceed otherwise, they would have so stipulated expressly in the Arrangement concluded between them.

" If, on the other hand, the Government of the Sudan intended to regulate the procedure of notification of judicial process to those who did not reside in the Sudan, in accordance with Article 61 of the *Recueil* of Sudanese Laws published in May 1925, and contrary to the system set out in the Arrangement of 1902, the later provision is not binding on Egyptian courts which are requested to give exequatur to Sudanese judgments. That is because the Arrangement of 1902 is a Treaty concluded between Egypt and the Sudan, and under the rules of public international law concerning treaties neither of the two States has the right to release itself from the provisions of the Treaty by an unilateral act. The court, in either of the States, which is seised of an action in which the defendant is domiciled in the other State, must *ex officio* enquire whether the notification was given in conformity with the Arrangement of 1902, even if provisions of the municipal law of the defendant's country are contrary to those provisions. In fact, it is generally accepted in public international law that if the provisions of a treaty are in conflict with those of municipal law, it is the treaty provisions which categorically must be applied, whether the municipal law was promulgated before or after the conclusion of the treaty. That is because a treaty is a contractual nexus between two States and upon it municipal legislation, whether antecedent or subsequent, can have no effect.

" As regards the contention on the part of the appellant that the judgment appealed from ran counter to the rules of private international law and to the provisions of Article 491 and 493 (2) of the Code of Procedure, the following reply may be made:

" Although the rules of procedure are subject to the law to which the court seised of the matter is amenable and if those rules are regulated by a treaty concluded between the State to which the court belongs and another State, then, in accordance with the principles of public international law mentioned above, the court is under an obligation to apply, in their regard, the provisions of the Treaty, even if those provisions are contrary to the municipal law of the courts.

" If the provisions of the Treaty were not followed, the judgment given in this matter has no binding force in the other country, nor is it conclusive. Consequently, the judgment appealed from, being based on the fact that the notification of the respondent was given in a manner contrary to the system laid down in the Arrangement of 1902, did not apply the law wrongly, nor was it contrary to the provisions of Articles 491 and 493 (2) of the Code of Procedure, seeing that the summons in the action in which the exequatur is being applied for failed to comply with the provisions of the Arrangement of 1902.

" As regards the contentions of the appellant that the judgment was contrary to the rule of reciprocity, which is recognized in private international law as well as by Article 491 of the Code of Procedure, that allegation cannot succeed seeing that the judgment appealed from was based on the fact that the rules of procedure mentioned in the Arrangement, which constitutes the law of the two States concerning the notification of judicial process, were not observed. The Law promulgated in 1901 by the Government of the Sudan concerning the grant of exequatur in the Sudan for Egyptian judgments, provides in Article 8 that the Egyptian judgment cannot be given until the defendant has been summoned in the manner prescribed by Egyptian law itself. Seeing, therefore, that the law which the Tribunal of Khartoum, which gave the judgment which is the object of the present appeal, was bound to apply in regard to the notification of the process which originated the proceedings, was the Arrangement of 1902, the effect of the failure to comply with the provisions of that Arrangement was to deprive the judgment of any binding force before the Egyptian courts, because the judgment is based on a procedure contrary to the law which ought to be applied in the Sudan in a case of this kind, namely, the Arrangement of 1902. Consequently, the judgment is a nullity and there is no occasion to invoke, in that regard, the rule of reciprocity recognized in private international law.

" As regards the fourth ground of appeal, that the decision of the [Egyptian] Council of Ministers of May 17, 1902, approving the Arrangement concluded between the two States, does not constitute an instrument which has legislative force, the following reply can be made:

"The provisions of the Arrangement of 1902 are binding on the two Governments. Neither of them may renounce the system therein provided for the notification of judicial process and adopt a different system without the consent of the other—as has been demonstrated above in the reply to the first ground of appeal.

"As regards the fact that the Government of the Sudan failed to promulgate the Law as provided by Article 23 of the Arrangement, the Law is none the less a law, and one entitled to be respected by the courts of both States, especially as the Government of the Sudan published the Arrangement in its *Recueil* of Laws and as the Arrangement has been carried out, by both Governments, since the date of its conclusion.

"As regards the failure to promulgate the Arrangement by means of a rescript or a decree, it should be mentioned that in Egypt legislative enactments, at the time of the conclusion of the Arrangement, were issued by various agencies: the executive and legislative powers were in the same hands. Laws were promulgated in the form of decrees or ordinances or in the form of regulations or bye-laws or in some other form. Article 167 of the Constitution of 1923 gave all these instruments the character of laws by providing:

> 'The provisions of laws, decrees, orders, regulations, bye-laws, decisions and all other acts or measures enacted or taken in the past and according to the rules and forms hitherto adopted, shall remain in force. In the same way, treaties shall be submitted to Parliament for promulgation as a law or shall be promulgated by Decree of the Head of State or published as laws.'

"The Arrangement of 1902 was approved by the Council of Ministers and published in the *Journal Officiel* as also in the Egyptian collection of laws and decrees; it must therefore be regarded as a law of the State. . . ."

[Report: *Revue égyptienne de droit international,* vol. 13 (1957), pp. 122, 127.]

Treaties—Operation of—Necessity for Municipal Legislation—"Matters arising directly under any treaty"—Interpretation of Municipal Law Arising Out of a Treaty—The Treaty as Actual Object of Interpretation—The Law of Australia.

BLUETT *v.* FADDEN.

Australia, Supreme Court of New South Wales.

(McLelland J.)

April 26 and *June* 29, 1956.

THE FACTS.—On May 18, 1953, the Treasurer of the Commonwealth, purporting to act under the provisions of the Trading with the Enemy Act, 1939–1952 (Cth.), made an order purporting to vest in the Controller of Enemy Property forty-two shares in Bayer Pharma Pty. Ltd., one of which was registered in the name of Bluett and the remaining forty-one of which were registered in the name of the Sterling Drug Company. Bluett and the Sterling Drug Company commenced an action contesting the validity of the vesting order. The defendants (the Treasurer of the Commonwealth, the Controller of Enemy Property, and the Commonwealth of Australia) alleged that prior to the acquisition of the shares by the plaintiffs they had been held, to the plaintiffs' knowledge, by one W. as trustee for a German company; that the shares were therefore German enemy assets within the meaning of Article 6 of the Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold[1] (of which Agreement the Commonwealth Government was a Signatory Government); and that the above-mentioned vesting order was made pursuant to Regulation 16A of the National Security (Enemy Property) Regulations[2] for the purpose of enabling effect to be given to Article 6 of the above-mentioned Agreement. The plaintiffs joined issue on the statement of defence. On the suit coming on for hearing, leave was given to the defendants to add a further paragraph to the statement of defence in the following terms: "that this suit involves a matter directly arising under a treaty within the meaning of section 38 of the Judiciary Act." Section 38, so far as is relevant, is in the following terms:

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[1] The relevant part of Article 6 of the Agreement contains the following provisions:

"A. Each Signatory Government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets (net of accrued taxes, liens, expenses of administration, other *in rem* charges against specific items and legitimate contract claims against the German former owners of such assets).

"E. The German enemy assets to be charged against reparation shares shall include assets which are in reality German enemy assets, despite the fact that the nominal owner of such assets is not a German enemy. Each Signatory Government shall enact legislation or take other appropriate steps, if it has not already done so to render null and void all transfers made, after the occupation of its territory or its entry into the war, for the fraudulent purpose of cloaking German enemy interests, and thus saving them harmless from the effect of control measures regarding German enemy interests."

[2] Regulation 16A is, so far as is material, in the following terms:

"(1) The Treasurer may, for the purpose of enabling effect to be given to—

"(*a*) Article Six of the Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold (being the agreement the terms of which were recommended for signature by the Paris Conference on Reparation that concluded its meeting on the twenty-first day of December, One thousand nine hundred and forty-five, to which agreement Australia is a party); . . .

"by order vest in the Controller—

"(*f*) any property belonging to any enemy subject or otherwise included in the expression 'German enemy assets' in Article Six of the Agreement referred to in paragraph (*a*) of this sub-regulation; . . .

> "The jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:
> (a) matters arising directly under any treaty."

Similarly, section 75 of the Constitution of the Commonwealth, so far as is relevant, provides:

> "In all matters—
> (i) Arising under any treaty: . . .
> the High Court shall have original jurisdiction."

Thus if this last-mentioned allegation were true, the Supreme Court of New South Wales would have no jurisdiction in the proceedings. Accordingly, this allegation was made the subject of a preliminary argument on a point of law.

Held (on April 26, 1956): that the Court had jurisdiction. Treaties were not justiciable until carried into effect by appropriate legislative action, and rights conferred by such legislation arose under the legislation and not under the treaty; however, where the terms of a treaty conferring rights had by legislation been made part of the law of the land and that legislation fell to be judicially interpreted, it was in a real sense the treaty which was being interpreted.

The Court said: "It appears that the phrase 'arising under any treaty' in s. 75 of the Constitution, as also the phrases (i) 'arising under this Constitution, or involving its interpretation'; and (ii) 'arising under any laws made by the Parliament' contained in s. 76 were adopted from the American Constitution, which provides that the judicial power shall extend to 'all cases, in law and in equity, arising under this Constitution, the Laws of the United States, and treaties', &c. The decisions in America interpreting this provision are not completely consistent and many of them are referred to in the judgment of Latham C.J. in *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett.*[1]

"These decisions serve to show, however, what constructions are possible.

"One is that 'a matter arises under' if the right sought to be

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"(2) Subject to regulation 16D of these Regulations, an order made under this regulation vests in the Controller the property the subject of the order without the necessity of any further conveyance, assignment or other instrument.

"(3) Where the property vested in the Controller consists of inscribed or registered stock, shares or other securities, the registrar, company, authority or body by which the securities were issued or are managed shall, on the application of the Controller, enter the Controller in the books in which the securities are inscribed or registered as the proprietor of the securities.

"(4) Nothing in any other law or in the constitution or rules of a company, authority or body prevents the compliance by the company, authority or body with an application made by the Controller in accordance with the last preceding sub-regulation.

"(5) For the purpose of this regulation, 'property' means real or personal property (including debts or other choses in action and rights, whether legal or equitable, in or arising out of real or personal property)."

[1] (1945) 70 C.L.R. 141, at pp. 152, 153.

enforced owes its existence to the Constitution or Federal Law or treaty.

"Another is that 'a matter arises under' only if the decision of the case depends upon the interpretation of the Constitution or of a Federal law or of a treaty.

"A third is that 'a matter arises under' if either of the above circumstances exist.

"I find myself unable to suggest any other possibilities and no other possibilities were suggested to me.

"So far as treaties are concerned, the position in the United States is that treaties are part of the supreme law of the land binding the judges in every State, whereas in Australia, a treaty does not of itself have legislative effect and cannot be the subject of judicial cognisance until it has received legal sanction and has been carried into operation by appropriate legislative action.

"It is the legislation which creates the rights which are justiciable and I am of opinion that, having regard to this fact, the rights can only be said to arise under the legislation and cannot be said to arise under the treaty.

"Section 75 must, I think, be taken to refer to cases where the decision of the case depends upon the interpretation of the treaty. In such cases, the matter in question arises under the treaty.

"It is, of course, primarily the legislation which has to be interpreted but, where the terms of the treaty have by legislation been made part of the law of the land, it is in a very real sense the treaty which is being interpreted. I may add that I find it difficult to ascertain any subject-matter falling within s. 75, if s. 75 does not refer to the type of case I have mentioned.

"There then falls for consideration s. 38 of the Judiciary Act. Are the matters involved 'matters arising directly under any treaty'? I may say in passing that, should I have been wrong in thinking that rights conferred by the legislation which implements a treaty do not arise under the treaty, I would be of opinion that such rights could not be said to arise 'directly' under the treaty.

"What then is the position so far as the interpretation of the treaty is concerned?

"In this case the Treasurer is enabled to vest in the Controller 'any property belonging to an enemy subject' or otherwise included in the expression 'German enemy assets' in art. 6 of the agreement 'for the purpose of enabling effect to be given to Article 6 of the agreement', and if, in this case, questions of the interpretation of the treaty arose, I would think that such questions were matters directly arising under the treaty: *cf. Public Trustee* v. *Wolf.*[1] But, up to the present time, have any questions of the interpretation of the treaty arisen?

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[1] [1923] A.C. 544, at pp. 552 *et seq.*

" In *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of A/asia*,[1] Isaacs J., discussing the meaning of the phrase ' upon any question arising ', said:

> " ' The second phrase, " upon any question arising ", is of central importance. It is manifestly impossible for this Court or any other Court to " hear and determine " a question so as to give it the character of a conclusive judgment, unless that question " arises " so as necessarily to enter into the legal determination of the matter upon the facts stated. Remote or merely possible relation of the question of law to the facts is not enough to make the question " arise " in a legal sense. To say that it *may* arise is not the same as saying it *does* arise, which is the meaning of " arising ". We have only to remember the use of the word " arising " in s. 75 of the Constitution to see the vital importance of this. If it applied to every matter which *may* arise under the Constitution or under a Commonwealth law, though in fact the Constitution or the statute is irrelevant, the judicial power of this Court would be almost illimitably enlarged and would extend into matters that proved to be purely State jurisdiction. Further, by reflex action the operation of s. 77 (II) could be made almost to strip State Courts of all jurisdiction. So with s. 40A of the Judiciary Act. If a question " arises " merely because a possible state of facts may eventually be accepted as the true state of facts, then s. 40A would, on that mere possibility, denude the Supreme Court of a State of jurisdiction to proceed even to a judgment determining the facts actually to be otherwise.
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> " 'Both these intolerable positions are, however, contrary to express decisions of this Court. . . . These decisions then establish that " arising " means necessary for the decision on the ascertained or asserted facts of the case.'

" In *R.* v. *Bevan; Ex parte Elias and Gordon*,[2] Williams J. said ' a constitutional question arises when its determination becomes necessary upon the ascertained or asserted facts of the case '.

" In my opinion, up to the present, no question of the interpretation of the treaty has arisen.

" It appears to me that the pleadings in this case, which represent all that is before me at present, raise only questions of fact, the determination of which will determine the suit without any question of the interpretation of the treaty arising.

" If the facts alleged by the plaintiff were proved, it would seem that the plaintiffs would succeed and, if the facts alleged in par. 6 of the statement of defence were proved, the defendants would succeed without in either case any question of interpretation arising.

" It is true that in par. 4 of the statement of defence the defendants say ' that the said shares have been duly vested by the said Order in the defendant the Controller of Enemy Property and are held by it and will be held and dealt with by it in the manner and in accordance with the powers provided by and conferred by the Statutes and Regulations relating thereto ', and it is possible that under this general allegation facts not specifically stated may become relevant: but, *prima facie*, the only facts alleged in support of the general allegation are those set out in par. 6 and no other facts have been suggested as possibly relevant.

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[1] (1925) 36 C.L.R. 442, at p. 450.

[2] (1942) 66 C.L.R. 452, at p. 480.

" I find that as yet no matter ' has arisen under a treaty ' and that, so far as the material before me discloses, this suit does not involve a matter directly arising under a treaty, within the meaning of s. 38 of the Judiciary Act.

" I shall adjourn the further hearing of the suit . . . so that the parties may consider their respective positions."

When the suit came on for a further hearing, the defendants applied for leave to amend their statement of defence. One amendment was the addition of the following sub-paragraph:

> " The defendants further charge and the fact is that the said transfer of 41 shares in the company by the plaintiff Campbell Anstruther Bluett to the plaintiff Sterling Drug Inc. was made by the plaintiff Campbell Anstruther Bluett ' for the fraudulent purpose of cloaking German enemy interests and thus saving them harmless from the effect of control measures regarding German enemy interests ' within the meaning of the said Article of the said Agreement."[1]

The second amendment had for effect the rewriting of one sub-paragraph so as to read as follows:

> " The defendants say and submit that, whether the plaintiff Sterling Drug Inc. was or was not aware of the matters set forth in sub-paragraph (h) above, the said shares mentioned in paragraph 5 of the statement of claim were German enemy assets within the meaning of the said Article of the said Agreement."[2]

Held (on June 29, 1956): that the Supreme Court of New South Wales had no jurisdiction. The pleadings raised a matter " directly arising under a Treaty ", and the matter was therefore within the exclusive jurisdiction of the High Court of Australia.

The Court said: " I am of the opinion that these amendments raise upon the pleadings a question of the interpretation of the treaty and a matter ' directly arising under a treaty '.

" It is true that, if when the facts come before me I should find that at all relevant times and particularly that prior to 29th September, 1938, Mr. Bluett had been the beneficial owner of the original twenty shares in the company, this would determine the suit without any further question arising: but, upon the facts asserted by the defendants in the statement of defence, as amended, a question of the interpretation of the treaty is in fact raised.

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[1] *I.e.*, Article 6 of the Agreement on Reparation from Germany, etc. [see *supra*, p. 478, n. 1.]

[2] *I.e.*, Article 6 of the Agreement on Reparation from Germany, etc.

"I have not reached a conclusion in this matter without doubt, particularly having in mind what was said by Jordan C.J. in *Ex parte King; Re University of Sydney*[1] in relation to the duty of the Supreme Court under the terms of ss. 38A and 40A of the Judiciary Act when an *inter se* question is raised and also a *non inter se* question which is capable of disposing of the whole matter, such a situation having an analogy to the situation which arises in the present case."

[Report: (1956) 56 State Reports (New South Wales) 254.]

Treaties—Operation of—Treaties of Commerce and Navigation—Corporation Created under English Law with Principal Office in United Kingdom—Capacity to Sue and Be Sued Before Siamese Courts—Direct Application by Court of Provisions of Bilateral Treaties.

CUSSONS, SONS AND CO. LTD., PHYA ATTAKROM MANUTTI *v.* RIEW CHIANG, DIRECTOR OF SRIMONGKOL TRADING CORPORATION.

Siam, Supreme Dika Court. November 12, 1956.

(Prasart Winitchai, Manuparn Wimolsarn and Pibul Aisawan JJ.)

THE FACTS.—The plaintiff was a company incorporated under English law for the purpose of producing and selling chemicals, such as perfumes, cosmetics and ointments, in England and abroad. Its area of operation included Thailand. Among its products, the plaintiff sold a type of powder contained in tins labelled "Cussons Coronation Talcum" in Thailand through its sole distributor, Muller and Pipp (Thai) Co., Ltd., and two sub-agents, Sakul Thai Co., Ltd., and Kim Ha Hiang. In September 1953, the plaintiff applied for registration of its trade-mark in respect of this type of powder in accordance with the requirements of the Trade-Marks Act, 1931. The registry informed the plaintiff that this particular trade-mark resembled a trade-mark applied for by another person before the plaintiff's application. The plaintiff thereupon authorized its representative, Phya Attakrom Manutti, to bring an action before the Court for damages and to apply for an order from the Court to restrain the defendant from using the trade-mark in question. The defendants contended, *inter alia*, that it was not satisfied with evidence that the plaintiff was a juristic person under Siamese law, and that its representative was not lawfully authorized and therefore had no right to bring the action on the plaintiff's behalf. The plaintiff relied on Treaties of Commerce (details of which are set out in the *Held*, below) between Siam and the United Kingdom.

The Court of First Instance found that the plaintiff was a juristic person and that Phya Attakrom Manutti, its representative, was lawfully authorized to apply for registration of its trade-mark and to bring suit before the Court on its behalf. These findings were approved by the Court of Appeal, which reaffirmed the judgment of the Court below in favour of the plaintiff on the grounds that the word " Cussons " was the name of the plaintiff Company, that the picture in the trade-mark was designed by the plaintiff and had been used by it for fifty years, and that the articles in question were sold by the plaintiff in Siam nine years before the defendant started using the trade-mark under dispute. The defendant appealed to the Supreme Dika Court.

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[1] (1943) 44 S.R. (N.S.W.) 19, at p. 28.

Held: that the appeal must be dismissed. The plaintiff could bring an action before Siamese Courts independently of the question whether or not it was regarded as a juristic person under Siamese law. A corporation created under English law enjoyed the right to sue and be sued in Siam by virtue of certain provisions of Treaties of Commerce and Navigation concluded between the two Kingdoms in 1925 and 1937.

The Court said: " With regard to the defendant's argument that the plaintiff is not a juristic person and cannot sue or be sued before the Court in this country, Mr. S. D. Ball, managing director of Muller and Pipp (Thai) Co., Ltd., commercial agent of the plaintiff, testified that the plaintiff is a corporation registered in the United Kingdom and has a head office in that country. Furthermore, the plaintiff permitted a testimonial from Mr. Edwin Courtney Walker, notary public of London, to the effect that Mr. B. Utermann and Mr. H. K. Savage, who signed the enabling document (transferring the power of attorney to the representative), are respectively director and secretary of Cussons, Son and Company Limited, and that they have been authorized to sign such documents on behalf of the Company. The defendant adduced no evidence to the contrary. It is therefore clearly established that the plaintiff is a corporation created in accordance with the law of the United Kingdom and duly registered in that country, and that its principal office is situated in the country of its registration. Whether or not the plaintiff is a juristic person under Siamese law is of little relevance in the circumstances. The plaintiff is entitled to sue and be sued before a Siamese Court independently and irrespective of the existence of its juristic personality under Siamese law. It may do so by virtue of Article 20 of the Treaty of Commerce and Navigation between the Kingdom of Siam and the United Kingdom, signed on July 14, 1925,[1] and Articles 4 and 5 (2) of the Treaty of Commerce and Navigation concluded between Thailand and the United Kingdom on November 23, 1937.[1] The appeal on this ground must therefore be rejected."

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[1] Command Paper No. 2643. Article 20 of the Treaty of 1925 provides: " Limited liability and other companies, partnerships and associations formed for the purpose of commerce, insurance, finance, industry, transport or any other business, and established in the territories of either party, shall, provided that they have been duly constituted in accordance with the laws in force in such territories be entitled, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other party."

[Reports: *Supreme Court Decisions*, No. 1490/2499; S.Ct.R. 1956, Part III, pp. 1272–1281.]

NOTE.—Although the general question of the necessity for municipal legislation is not expressly referred to in the decision, the present case is of interest for the reason that the exclusive authority upon which the Supreme Court, differing from the Courts below, expressly preferred to base its recognition of the capacity of the plaintiff corporation to sue and be sued in Siamese courts is the Anglo-Siamese Treaties of Commerce and Navigation, 1925 and 1937. This does not mean that the Court will necessarily take cognizance of all the provisions of every treaty concluded by Siam, or that it will apply them irrespective of whether or not the treaty in question has been made law by legislative enactment. Thus Section 54 of the Constitution of 1932 and Section 92 of the Constitution of 1952 impose certain limitations on the royal prerogative to conclude treaties with foreign States. One of these limitations is that treaties which (1) provide for a change in the territories of the country, or (2) require the enactment of a law to implement their provisions, must receive the approval of the Legislative Assembly. The omission on the part of the Supreme Court of reference to the requirement of legislative enactment may perhaps be explained by the fact that the provisions under consideration, namely, regarding the capacity of British corporations to sue and be sued in Siamese courts, clearly do not require legislative enactment for implementation, although it should be added that both Treaties had in fact been proclaimed law by the King: the Treaty of 1925 was followed by a Royal Proclamation of May 1, 1926, and the Treaty of 1937 by a similar Proclamation of February 19, 1938. A further explanation may be given in the light of the constitutional history of Siam. Until 1932, Siam had been an absolute monarchy. Under the *ancien régime* it was the King's absolute prerogative to make war and peace and to conclude treaties with foreign nations. There was never any necessity for legislative enactment to implement treaties concluded by the King. Such treaties automatically and unquestionably had the force of law. The Anglo-Siamese Treaty of 1925 belongs to this category. Its provisions continued in force even after the change-over to a constitutional régime. As late as November 13, 1937, the Siamese Govermnent undertook that " the rights hitherto enjoyed in Siam under the Anglo-Siamese Treaties of 1925 by British subjects and protected persons and by British vessels, companies and goods shall be continued until the coming into force of the new treaty." (Command Paper No. 5730). The relevant provisions of the Treaty of 1937 conferred no new rights on foreigners but merely re-enacted the provisions of the older Treaty of Commerce, which never required legislative enactment in the first place. The continued recognition by Siamese Courts of the right of British corporations to sue and be sued appears to be the logical consequence of the application of the Treaty of 1937.

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[1] Command Paper No. 5731. Article 4 of the Treaty of 1937 provides: "The subjects of each High Contracting Party shall, in the territories of the other, have access to the Courts of Justice for the prosecution and defence of their rights. They shall be at liberty, equally with subjects or citizens of that other High Contracting Party or of the most favoured foreign country, to choose and employ in all causes and proceedings lawyers, advocates, attorneys, agents and representatives to prosecute and defend their rights before such Courts from among the persons entitled to act as such in those territories. There shall be no condition or requirement imposed upon the subjects of either High Contracting Party in connexion with such access to the Court of Justice in the territories of the other, which do not apply to the subjects or citizens of the other or of the most favoured foreign country."

Article 5 (2) provides: "The provisions of Article . . . 4 of the present Treaty, relative to the subjects of the High Contracting Parties, shall equally apply to companies of the High Contracting Parties and shall, for this purpose, be read as though the word 'companies' were in every case substituted for the word 'subjects' in those provisions."

Treaties—Operation of—Treaties and Agreements—The Law of Mexico.

BAUTISTA *v.* MARTINEZ.

Mexico, Supreme Court. November 15, 1955.

THE FACTS.—The accused fraudulently promised the plaintiff and others that he would obtain for them, upon payment of a fee, the proper documents and permits to enable them to work on contract as agricultural labourers in the United States. No contract was ever made and, upon proceedings being instituted, a conflict of jurisdiction arose between the state and federal courts on the ground that an international treaty may have been involved.

Held (by the Supreme Court, sitting *en banc* to decide a conflict of judicial jurisdiction): that Article 41 of the Organic Law on the Federal Judiciary provided that " federal " crimes would be considered as those covered in federal or national legislation or in treaties, the latter being of an international character entered into by the President of the Nation with foreign nations and ratified by the National Congress. In the present case, there was no international treaty with the United States on the contracting of manual labourers from Mexico (popularly known as " braceros "), but merely an agreement between the two Governments, approved on August 11, 1951, which provided for agricultural workers to be hired in the United States. The Court ruled, therefore, that the offence in question did not constitute a " federal " crime, and that the State Court had jurisdiction.

[Report: *Boletin de Informacion Judicial*, Año XI, No. 101, January 2, 1956, p. 11.]

Treaties—Operation and Enforcement of—Relation to Municipal Law—Treaty Enunciating General Principles Subordinated to Subsequent Municipal Legislation—The Law of Cuba.

SOBRINOS DE ABACAL, S.L. *v.* ADMINISTRATION OF CUSTOMS.

Cuba, Supreme Court. February 28, 1956.

(Rosell (President); Cantero, Torres, Portela and Miranda.)

THE FACTS.—This was an appeal from a decision of an inferior Court.

Article 3 of the General Agreement on Tariffs and Trade of 1947, brought into operation in Cuba by Decree No. 4169 of December 30, 1947, provides that internal taxes shall not be applied to afford preference to domestic over imported products. Under Article 4 of Decree No. 5122 of 1949, import duties were imposed on certain merchandise. The appellant Company claimed a declaration that the levying of the duty under the Decree of 1949 on goods which it had imported, was unlawful, on the ground that the Decree infringed the terms of the General Agreement on Tariffs and Trade. The Court of first instance dismissed the claim, holding that the Decree could not be regarded as invalidated by " provisions of an international treaty that are limited to enunciation, in abstract terms, of the principle of commercial reciprocity, and that in and of themselves have no obligatory force until such provisions have been ratified subsequently to the enforcement of the Treaty ".

The Company now appealed against that decision to the Supreme Court.

Held: that the appeal must fail. The provisions of the General Agreement on Tariffs and Trade were in broad terms and could not invalidate subsequent municipal legislation.

The Court said: " The first ground of appeal deals exclusively with the issue whether the product imported is comprised within the exemptions of Article 6 of Decree 5122 of 1949, according to the provisions of Article 3 of the General Agreement on Tariffs and Trade brought into operation by Decree 4169 of December 30, 1947. But since the judgment of the lower Court is not being impugned on the point that provisions of domestic law of the Nation may not be subordinated to provisions in an international treaty, which in and of themselves contain no obligatory force on the said legal provisions, the first ground of appeal must be dismissed.

" With regard to the second ground of appeal on which the judgment of the lower Court is being impugned, the reasons for that judgment have nothing whatever to do with the pre-eminence of an international treaty over the provisions of domestic law of a State."

[Report: *Jurisprudencia al Dia, Materia Civil,* No. 5, 1956, p. 157.]

Treaties—Operation and Enforcement of—Distinction between Treaty and Executive Agreement—Agreement regarding Jurisdiction over Visiting Foreign Armed Forces—Executive Agreement—Conflict between Executive Agreement and Prior Inconsistent Statute—The Law of the United States of America.

See p. 241 (*United States* v. *Copeland et Al.*).

Treaties—Operation and Enforcement of—Alleged Breach of Treaty—Action by Private Individual Against United States of America for Failure to Fulfil Treaty Obligation.

See p. 360 (*Falcon Dam Constructors et Al.* v. *United States*).

Treaties—Operation of—Private Contracts Inconsistent with Treaty Provisions—Validity of, Under Municipal Law—Exchange Regulations—Bretton Woods Agreements.

See p. 581 (*Southwestern Shipping Corporation* v. *The National City Bank of New York*).

Treaties—Operation and Enforcement of—Self-Executing Treaties —Municipal Legislation—International Convention for the Protection of Industrial Property, 1934.

See p. 134 (*Vanity Fair Mills, Inc.* v. *T. Eaton Co. Ltd. et Al.*).

Treaties—Operation and Enforcement of—Right of Individuals to Invoke Treaty Provisions—Agreements on Compensation for War Damage.

See p. 205 (*Société Anonyme " Eau, Gaz, Electricité et Applications "* v. *Office d'Aide mutuelle*).

Treaties—Operation and Enforcement of—Relation to Municipal Law—European Convention on Human Rights, 1950—Whether Affecting Municipal Law on Treatment of Aliens—The Law of Germany.

See p. 393 (*Expulsion of Alien (Germany) Case*).

Treaties—Operation of—Necessity for Municipal Legislation—Treaty of Peace—The Law of Singapore.

See p. 687 (*Public Trustee* v. *Chartered Bank of India, Australia and China*).

Treaties—Operation and Enforcement of—Administrative Agreement Under Security Treaty of 1952 between United States of America and Japan—Application of—Whether Involving Constitutional Provision Relating to Treaties.

See p. 264 (*Japan* v. *Cheney*).

Treaties—Operation of—Change of Municipal Law Subsequent to Extradition Treaty—The Law of Argentina.

See p. 412 (*Re Candino de Pepe*).

C—TERMINATION OF TREATIES

I.—By Operation of Law

ii.—Extinction or Dismemberment of Contracting Party

Treaties—Termination of—Extinction of One Contracting Party—Incorporation of Austria into German Reich—Effect on Treaties Concluded between Austria and Germany—Lapse of Double Taxation Agreement of 1922.

See p. 123 (*Double Taxation Agreement* (*Austria*) *Case*).

iii.—Outbreak of War

[*See also* PART XI, WAR AND NEUTRALITY.]

Treaties—Termination of—By Operation of Law—Outbreak of War—Treaty of Amity, Commerce and Navigation—The Law of Canada.

See p. 459 (*Francis* v. *The Queen*).

D—INTERPRETATION OF TREATIES

I.—Agencies of Interpretation

Treaties—Interpretation of—Agencies of Interpretation—Contemporaneous Construction by One Party—The Executive—Tax Treaty—Effect on Nationals of a Party—The Law of the United States of America.

CRERAR *v.* COMMISSIONER OF INTERNAL REVENUE.

United States, Tax Court. June 27, 1956.

THE FACTS.—The Commissioner had determined a deficiency in the petitioner's income tax for the year 1952 in the amount of $1,097.64. The petitioner was a citizen of the United States, but a permanent resident of Canada. All of her income from 1952 was derived from sources within the United States, and none of it was compensation for services performed outside the United States. The petitioner contended that she was entitled to have her income computed on the basis of her gross income at the flat rate of 15 per cent. since she fell within Article XI, paragraph 1, of the Convention and Protocol between the United States and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion in the Case of Income Taxes, signed at Washington on March 4, 1942 (56 Stat. 1399, T.S. No. 983, 124 U.N.T.S. 271), the text of which is quoted in footnote 1 of the opinion. That paragraph limited to that amount the rate of tax by one party on individuals residing in the territory of the other party. The Commissioner maintained that the petitioner was fully subject to the laws of the United States relating to income tax, pursuant to Article XVII of the Convention.

Held: that the determination of the Commissioner must be sustained. Although the literal language of Article XVII of the Convention might suggest that the citizens of the United States must include within the basis upon which income taxes are imposed all items of income taxable under the revenue laws of the United States but that the rate to be applied thereto should be the 15 per cent. rate provided by the Convention, the consistent interpretation of the Convention by the United States had been that the Treaty did not in any way affect the liability to United States taxation of United States citizens resident in Canada.

The Court said: " The issue is whether petitioner, a nonresident citizen, is on ' the same footing ' as a resident citizen for the purpose of computing the amount of her United States income tax, under the facts, for 1952; that is to say, whether the tax is to be computed upon her *net* income (as computed under provisions of the 1939 Internal Revenue Code), at the rates prescribed in sections 11 and 12 of the Code.

" Petitioner contends that she is not ' on the same footing ' as a resident citizen for our income tax purposes, but that she is entitled to have her United States income tax computed on the basis of her *gross* income at the flat rate of 15 per cent thereof, under certain provisions of the Convention and Protocol between the United States and Canada, 56 Stat. 1399, proclaimed by the President of the United States on June 17, 1942, and effective January 1, 1941 (hereinafter referred to as the Tax Convention), and under certain subsequent modifications thereof. Petitioner cites no authority for her contention other than paragraph 1 of article XI thereof which is set forth in the margin.[1]

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[1] Article XI. 1. The rate of income tax imposed by one of the contracting States, in respect of income derived from sources therein, upon individuals residing in, or corporations organized under the laws of, the other contracting State, and not having a permanent establishment in the former State, shall not exceed fifteen per cent for each taxable year.

"The respondent states on brief that article XI, paragraph 1, of the Tax Convention between the United States and Canada does not apply to a citizen of the United States residing in Canada and that, therefore, a citizen of the United States who resides in Canada is taxable under the Internal Revenue Code. Respondent refers to article XVII of the Tax Convention which provides as follows:

> 'Notwithstanding any other provision of this convention, *the United States of America in determining the income and excess profits taxes, including all surtaxes, of its citizens* or residents or corporations, *may include in the basis upon which such taxes are imposed all items of income taxable under the revenue laws of the United States of America as though this convention had not come into effect.'* [Italics supplied.]

The respondent states that 'Article XVII of the Tax Convention between the United States and Canada specifically provides that the United States may determine the income tax of its citizens as if the Convention had not come into effect.' Respondent refers, also, to the regulation promulgated pursuant to section 62 of the 1939 Code and article XVII of the Convention, T. D. 5206, 1943 C. B. 526, which provides, in part, as follows:

> 'SEC. 7.21. SCOPE OF REGULATIONS.— . . .
>
> 'The convention does not, except as provided in the first paragraph of Article VI, affect the liability to United States income tax of Canadian citizens resident in the United States nor does it affect such liability of a citizen of the United States residing in Canada. It has no application to individuals nonresident as to Canada even though such nonresident is a citizen of Canada.'

"The respondent has correctly stated the law as it applies to the question presented, under the facts here. Under article XVII, as amended, of the Tax Convention with Canada, the United States reserves the right 'to tax its citizens . . . as though the convention had not come into effect,' with certain exceptions. See Report of the Secretary of State to the President of the United States, dated June 29, 1950, reprinted in 5-B P.-H. 1956 Fed. Taxes par. 57,059; S. Rept., Exec. R, 81st Cong., 2d Sess.; and S. Exec. Rept. N. 3, 77th Cong., 2d Sess. (May 20, 1942), from the Committee on Foreign Relations, on the Tax Convention with Canada, where it is stated (p. 1):

'The convention makes no change in the United States tax liability of American citizens and residents and domestic corporations. Under the Federal income-tax laws, such taxpayers are liable upon their income from all sources whether derived from within or without the United States. To avoid double taxation, the United States income tax allows them a credit against the Federal income tax for income taxes paid to foreign countries.'

"The argument of the petitioner is to the effect that the provisions of article XVII of the Tax Convention do not specifically state that the United States, in determining the income tax (and other taxes) of its citizens (and others) reserves the right to compute the amount of the tax, i.e., use tax rates, under provisions of the Internal Revenue Code, and therefore article XI, paragraph 1, of the Tax Convention applies and the rate of tax shall be 15 per cent. Petitioner's contention appears at first to be logical, and it is understandable. Nevertheless, we are obliged to affirm the respondent's statement of the law embodied in the Tax Convention which, in article XVII, reserves to the United States the right to tax its citizens, *both those residing in the United States and those residing in Canada,*' as though this convention had not come into effect.' This reservation is implicit in the wording of article XVII of the Tax Convention.[1]

" Petitioner fears that the Commissioner has departed from, in the determination giving rise to the issue presented, other provisions of the Tax Convention, namely, article XI, paragraph 1, but that is not true. In determining the tax deficiency of this taxpayer, the Commissioner has followed the provisions of article XVII of the Tax Convention, and has accorded to this taxpayer the same treatment as other taxpayers receive in the same situation.

" If there is serious doubt about the meaning of article XVII of the Tax Convention with Canada, then we resort to the rule that the Commissioner's interpretation in his regulation and his administrative practice over a period of more than 10 years are to be given great weight. *Brewster* v. *Gage*, 280 U. S. 327; *Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 338; and *Lykes* v. *United States*, 343 U. S. 118.

" In his determination, the Commissioner has allowed petitioner credit[2] for income tax paid to Canada in 1952. This credit accomplishes some relief from double taxation and it constitutes all of the allowable relief."

[Report: 26 T. C. 702.]

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[1] See " Treaties to Eliminate International Double Taxation and Fiscal Evasion," Roy Blough, New York University Fifth Annual Institute on Federal Taxation (1947), p. 211, where it is pointed out that the United States, " almost uniquely in the world, follows its citizens abroad and subjects them to taxation even after they have established residence in a foreign country." See, however, section 131, 1939 Code.

See also " Income Tax Treaties with France, Sweden and Canada, and the Convention with Great Britain and Northern Ireland," Clarence Castimore, New York University Fourth Annual Institute on Federal Taxation (1946), pp. 537, 539, where the following is noted:

One common feature of all [the treaties] is that each nation retains full authority to tax its own citizens . . . according to its own laws . . . Due to the difference between the types of taxes levied and the rates imposed in the various countries, some of the arrangements to avoid double taxation are worked out by credit rather than exemption and yet allow the composite rate of the two countries to equal roughly the rate of taxation in the country of which the taxpayer is a national.

[2] T.D. 5206, 1943 C. B. 526, 541. SEC. 7.35. CREDIT AGAINST UNITED STATES TAX LIABILITY FOR INCOME TAX PAID TO CANADA.—For the purpose of avoidance of double taxation, Article XV provides that, on the part of the United States, there shall be allowed against the United States income and excess profits tax liability a credit for any such taxes paid to Canada by United

Treaties—Interpretation of—Agencies of Interpretation—Municipal Courts.

See p. 687 (*Public Trustee* v. *Chartered Bank of India, Australia and China*).

Treaties—Interpretation of—Agencies of Interpretation—Interpretation of Extradition Treaty by Executive—The Law of France.

See p. 418 (*Re Petalas*).

II.—Principles and Rules of Interpretation

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to Object of Treaty—Interpretation of Convention Providing for Unification of Rules of Private Law—Warsaw Convention of October 12, 1929, on International Carriage by Air—Where Action May be Brought Against Carrier—Jurisdiction Created by Treaty.

BERNER *ET AL. v.* UNITED AIRLINES *ET AL.*

United States, Supreme Court of New York, Special Term, New York County. January 30, 1956.

Supreme Court of New York, Appellate Division, First Department. December 18, 1956.

Court of Appeals of New York. December 6, 1957.

THE FACTS.—This was an action against United Airlines and British Commonwealth Pacific Airlines, Ltd., Quantas Empire Aviation, Ltd., and British Overseas Airways Corporation for damages resulting from the death of one Kapell, who had been killed in an aircraft accident while travelling on a British Commonwealth Pacific aircraft under a return ticket from San Francisco to Sydney, Australia. The ticket, which had been issued in New York by the British Overseas Airways Corporation, stipulated that carriage thereunder was " subject to the rules related to liability established by " the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on October 12, 1929 (49 Stat. 3000, T.S. No. 876, L.N.T.S., vol. 137, p. 11 (the " Warsaw Convention ")). Since both Australia and the United States were parties to that Agreement, the carriage would in any event have been subject to the Convention.

States citizens or domestic corporations. Such principle also applies in the case of a citizen of Canada residing in the United States. Such credit, however, is subject to the limitations provided in section 131, Internal Revenue Code (relating to the credit for foreign taxes). See sections 19.131–1 to 19.131–8, Regulations 103. The article is complementary to the provisions of Article XVII, which provides that the United States in ascertaining the income and excess profits tax of its citizens and residents and corporations may take into the basis upon which such taxes are imposed all items of income as though the convention had not come into effect.

At the time of the sale of the ticket, there was in existence a written agreement between British Commonwealth Pacific and British Overseas Airways Corporation, under which the latter was appointed general sales agent for the former. In addition, British Commonwealth Pacific undertook certain duties concerning the airworthiness of aircraft, the provision of personnel, and other operational matters. British Overseas Airways Corporation was under a number of duties regarding the promotion and carrying out of British Commonwealth Pacific's business and such operational matters as the making of investigations in the event of accidents. The summons on British Commonwealth Pacific was served on an assistant to the manager of the North Atlantic Division of the British Overseas Airways Corporation, as general sales agent for British Commonwealth Pacific.

Article 28, paragraph 1, of the Warsaw Convention provides:

> "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination."

British Commonwealth Pacific and Quantas moved to vacate and set aside the service of summons on the grounds that service was not made upon a proper representative of these airlines and that the Court did not have jurisdiction over them, since they both constituted foreign corporations not doing business in New York. The plaintiffs contended that the Court had jurisdiction by reason of the consent of the defendants to be sued in New York, as provided by the contract of carriage incorporating the rules of the Warsaw Convention.

Held (by the Supreme Court, Special Term): that the motion to vacate the service of the summons must be denied. Under the law of the State of New York, the services of British Overseas Airlines Corporation on behalf of British Commonwealth Pacific were sufficient to make the latter airline present within New York for jurisdictional purposes. This interpretation of the law of New York was consistent with the Warsaw Convention, which established rules of jurisdiction and not merely those of venue. The intent of Article 28 of the Convention, in dealing with the special problems posed by international air transportation, was to provide reasonable guarantees to persons whose custom might be solicited within the jurisdiction concerned. [Reports: 2. Misc. 2d 260, 149 N.Y.S. 2d 335, 4 Av. Cas. 17, 924.]

On appeal,

Held (by the Appellate Division of the Supreme Court): that the order denying the motion to vacate the service of summons must be affirmed. Under Article 28 of the Warsaw Convention, British Commonwealth Pacific maintained a place of business in New York such as to confer jurisdiction on a court of New York in an action for damages. A definite location in the area of jurisdiction, some regularity in the business of selling tickets, and the sale therein of the ticket which gave rise to the action met the requirements of the Convention. British Commonwealth Pacific was also " doing business " in such a way in New York as to give jurisdiction to the Court by service of process on the carrier's agent, British Overseas Airways Corporation.

The Court said: " By the express language of the Convention, the New York Supreme Court became vested with jurisdiction of ' An action for damages ' as described in article 28. It is a court in the territory of one of the High Contracting Parties; and it is ' the court ' where the carrier ' has a place of business through which the contract has been made '.

" This language includes places maintained by the carrier itself or through agents at which the ticket is sold. The language describes a ' place of business ', not necessarily in the broad or general connotation of the term, but one closely related to the sale of the ticket, i.e., where the ' contract has been made '.

" A definite location in the area of jurisdiction, some regularity in the business of selling tickets, and the sale there of the ticket which gives rise to ' An action for damages ' seem literally to meet the requirements of the situs of the court contemplated by the Convention. As to the specific contract of transportation here involved, the New York Supreme Court meets exactly the Convention requirements for jurisdiction.

" Whether the process that has been served, however, has given us jurisdiction in personam of British Commonwealth Pacific depends upon the extent that it was ' doing business ' in New York through the activities of British Overseas on its behalf. Exact definition of ' doing business ' in this context has never been achieved. There is, as Judge Cardozo noted in *Tauza* v. *Susquehanna Coal Co.* (220 N. Y. 259, 268) ' no precise test of the nature or extent of the business that must be done.' He added that all ' that is requisite ' is that ' enough be done ' so that the New York court will be able to say that the defendant ' is here '. The repeated citation of this decision confirms the elasticity of the basic concept.

" The Cardozo opinion distinguished the decision in *Green* v. *Chicago, Burlington & Quincy Ry.* (205 U. S. 530) which involved ' nothing more than that of solicitation ' (p. 533) as the Supreme Court itself later distinguished it as ' lacking a continuous course of business ' in the solicitation of orders (*International Harvester* v. *Kentucky*, 234 U. S. 579). The decision in *Holzer* v. *Dodge Bros.*

(233 N. Y. 216) turned on the special intramural relation of Dodge with its automobile dealers and did not weaken these general principles.

" Finally, it must be manifest that the concept of ' doing business ', even that resting on mere solicitation by salesmen, has been broadened by *International Shoe Co.* v. *Washington* (326 U. S. 310) which upheld sales activity as a ground of substituted service of process.

" The agency in New York created by British Commonwealth Pacific's contract was one of extraordinary breadth. It was not mere solicitation of business. The contract, as it has been seen by reference to the written agreement, delegated to the agent acting in New York the right in respect of the New York contracts of carriage to require a rather large number of operational and other aspects affecting the execution of the New York contract of carriage; and the duties of the agent acting in New York were broadly reciprocal and included assistance and aid in very general language.

" Activities of this kind of a corporate representative is ' doing business ' in the traditional sense. In principle it thus comes fairly close to the problems considered in *Goodman* v. *Pan American World Airways* (1 Misc 2d 959).

" And it seems to us, finally, that when British Commonwealth Pacific undertook by its agent to make a contract of air carriage in New York, expressly and in terms governed by the Warsaw Convention, at a ' place of business ' within the jurisdiction of the New York Supreme Court and that place of business is literally one ' through which the contract has been made ', it is doing business in such a way as to give jurisdiction by the service of process on the agent who thus is brought with the carrier's approval within the literal terms of the Convention.

" An intent to do business in New York and the implementation of the intent by activity in making the contract furnish sufficient criteria of activity here to give jurisdiction, when the Convention, the contract between carrier and agent, and the contract of carriage are seen in context.

" The same objection to jurisdiction is made by defendant sued as Quantas Empire Aviation, Ltd., which seems to have succeeded to certain of the rights of British Commonwealth Pacific Airlines, Ltd., but no distinction is made in the arguments or briefs between this corporation and British Commonwealth Pacific; and since the parties treat them in a unitary sense, we see no reason to distinguish between them in the form in which the case reaches us for decision." [Reports: 3 App. Div. 2d. 9; 157 N.Y.S. 2d 884.]

On further appeal,

Held (by the Court of Appeals of New York, without opinion): that the order must be affirmed.

[Reports: 3 N.Y. 2d 1003; 170 N.Y.S. 2d 340; 147 N.E. 2d 732.]

Treaties—Interpretation of—Principles and Rules of—Interpretation of Expressions " Justice ", " Right " and " Equity " by Reference to Rules of Municipal Law of Signatory—Interpretation of Expression " Free Access to the Courts "—"Administration of Justice " Interpreted as Subject Matter Allied to " Commerce and Navigation " in Most-Favoured-Nation Treaty—Interpretation by Reference to Customs of Period of Signature of Treaty —Interpretation by Reference to Intention of the Parties.

See p. 306 (*Ambatielos Claim*), at pp. 313, 314, 318 *et seq.*

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to " Bad Drafting "—Article 59 of Statute of Permanent Court of International Justice.

See p. 81 (*Lighthouses Arbitration between France and Greece—Claims No.* 11 *and* 4).

Treaties — Interpretation of — Principles and Rules of — Grammatical Construction—Rejection of.

See p. 106 (*Lighthouses Arbitration between France and Greece—Claim No.* 12*a*).

Treaties—Interpretation of—Principles and Rules of—Intention of the Parties.

See p. 680 (*Lighthouses Arbitration between France and Greece—Claim No.* 24).

Treaties—Interpretation of—Principles and Rules of—Intention of the Parties.

See p. 94 (*Lighthouses Arbitration between France and Greece—Counterclaim No.* 1).

Treaties—Interpretation of—Principles and Rules of—Principle of Good Faith.

See p. 342 (*Lighthouses Arbitration between France and Greece—Claim No.* 26).

Treaties—Interpretation of—Principles and Rules of—Interpretation of Treaty "According to Its Whole Tenor ".

See p. 687 (*Public Trustee* v. *Chartered Bank of India, Australia and China*).

Treaties—Interpretation of—Principles and Rules of—Restrictive Interpretation—Interpretation of Treaty Provisions by Reference to Other Provisions of Treaty—Interpretation by Reference to Treaty as a Whole—Interpretation by Reference to Absence of Specific Mention.

See p. 597 (*Groupement des Industries Sidérurgiques Luxembourgeoises* v. *The High Authority*).

Treaties — Interpretation of — Various Rules of — Contemporaneous Construction by One Party.

See p. 489 (*Crerar* v. *Commissioner of Internal Revenue*).

Treaties—Interpretation of—Principles and Rules of—Comparison of Languages of Text of Treaty.

See p. 472 (*N.* v. *X.*).

IV.—Consideration of Preparatory Work

Treaties—Interpretation of—Consideration of Preparatory Work —Article 59 of Statute of Permanent Court of International Justice.

See p. 81 (*Lighthouses Arbitration between France and Greece—Claims No.* 11 *and* 4).

Treaties—Interpretation of—Reference to Preparatory Work.

See p. 94 (*Lighthouses Arbitration between France and Greece—Counterclaim No.* 1.)

V.—Miscellaneous

Treaties—Interpretation of—Changed Conditions—Interpretation of Hague Regulations in Light of Changed Conditions of Warfare Since 1907.

See p. 810 (*N.V. De Bataafsche Petroleum Maatschappij and Others* v. *The War Damage Commission*).

Treaties—Interpretation of—Miscellaneous—Statement of Executive Department—The Law of France.

See p. 376 (*Re Sastella*).

Treaties—Interpretation of—Miscellaneous—Binding Force of Previous Judgment in *Lis* Concerning Interpretation of Treaty.

See p. 81 (*Lighthouses Arbitration between France and Greece—Claims No.* 11 *and* 4).

E—SPECIAL KINDS OF TREATIES

I.—Commercial Treaties. Most-Favoured-Nation Clause

Treaties—Special Kinds of Treaties—Commercial Treaties—Most-Favoured-Nation Clause—Nature of—Power to Attract Only Matters of Same Category of Subject—"Administration of Justice" as Subject Allied to "Commerce and Navigation"—Inability to Incorporate in Treaty Provisions of International Law—Guarantee of "Justice", "Right", "Equity", "Free Access to the Courts"—Meaning of These Terms.

See p. 306 (*Ambatielos Claim*), at pp. 313, 314, 318 *et seq.*

II.—Peace Treaties

Peace Treaties—Performance of—Restitution and Reparation Provisions—Whether Letting of Premises by Sequestrator Constitutes "a measure taken against property"—Distinction between Non-Discriminatory Measures of Humanitarian Nature and Those Directed to Prosecution of War—Absence of Connection with Economic War—Interpretation of Treaty—By Reference to *ratio legis* of Provision—Meaning of "Encumbrances and Charges"—Interpretation by *Reductio ad Absurdam*—Interpretation by Analogy.

PALUMBO CLAIM.

Italian-United States Conciliation Commission. March 1956.

(Matturri, Sorrentino, Sauser-Hall.)

THE FACTS.—The claimant was a United States national by naturalization, domiciled in New York. He owned certain property in Italy, including a six-roomed flat in Catania, which on June 18, 1945, was requisitioned, under Articles 2 and 3 of the Decree of the Lieutenant of the Realm No. 415 of December 28, 1944, by the Housing Commissioner in Catania on behalf of a Dr. Carmelo Mazza. Dr. Mazza had previously lived in that flat but he had been forced to leave it because it had been severely damaged in an air raid: he and his family had been rendered homeless. Dr. Mazza undertook to have the most urgent repair work carried out at his own expense, and a note to that effect was made in the requisition decree giving Dr. Mazza the right to use the claimant's flat as living quarters for himself and his family upon the payment of rent, which was the subject of a subsequent decree. After the war, the claimant went to Italy and endeavoured, unsuccessfully, to recover possession of his flat. He now applied to the Commission, under Article 78 (1) and

(2) of the Treaty of Peace with Italy of 1947,[1] for the restoration to him of his flat. The contentions of the parties appear from the *Held* below.

Held: that the claim must be rejected. The claimant's property was never the subject of a sequestration which gave the Italian Government control over the flat. The requisitioning of the latter to provide living quarters was not a measure taken against a United Nations national as such but a measure of assistance of a non-discriminatory nature.

The Commission said: " 1.—It is the contention of the Agent of the United States of America that the obligations undertaken by Italy under the above provisions imply the restoration of an apartment free of all encumbrances or charges resulting from requisition, even if this measure was adopted in the application of a law directed at ensuring living quarters to individuals who had been deprived of their homes, and, in support of his theory, he cites the arguments of a number of decisions handed down by the Italian-United States Conciliation Commission and by the Italo-French Conciliation Commission, chiefly Decision No. 107 of September 15, 1951, concerning the *Heirs of H.R.H. the Duc de Guise*,[2] the scope of which will be examined later. He concludes by requesting that the Commission decide that the Italian Government is obligated to re-establish Francesco Palumbo Corsaro, a national of the United States of America, in his full right to regain possession of his apartment located at Via Acacie No. 10, Catania, and to nullify the measure of requisition in behalf of Dr. Mazza.

" 2.—The Italian Government opposes this request on the grounds that the limitations to the owner's rights of control over his property are not the result of the war measures contemplated in the aforementioned articles of the Treaty of Peace, said to have been adopted by the Italian Government; that in the instant case the Italian Government has not adopted any measure of seizure, sequestration or control against the claimant's property.

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[1] Article 78 provides:

" 1. In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists.

" 2. The Italian Government undertakes that all property, rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Italian Government in connection with their return. The Italian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between June 10, 1940, and the coming into force of the present Treaty. In cases where the property has not been returned within six months from the coming into force of the present Treaty application shall be made to the Italian authorities not later than twelve months from the coming into force of the present Treaty, except in cases in which the claimant is able to show that he could not file his application within this period."

[2] *Recueil des Décisions*, Part III, p. 119; *International Law Reports*, 1951, Case No. 130 (*sub nom. Duc de Guise Claim*).

" He contends that the requisition of an apartment, under Italian law in the struggle against the lack of housing, is in the nature of a general measure which is applied regardless of the owner's nationality and which concerned Italian-owned property as well as the property of United Nations nationals and other aliens, and which cannot, therefore, give rise to any claim based on the Treaty of Peace.

" Some of the decisions of the Conciliation Commission cited by his Opponent appear to him to be non-pertinent while the others, if correctly interpreted, support his theory. The Agent of the Italian Government concludes by stating that his Government cannot be obligated to restore the *quo ante* status by nullifying the order of requisition, which would lead to the eviction of Dr. Mazza and his family from the apartment in which they are at present living and which Dr. Mazza has rendered habitable at his expense.

" 3.—The Commission must take notice of the fact that the disputed points of law between the two Governments are focussed on the question as to whether or not the implementation of Decree No. 415 of the Lieutenant of the Realm of December 28, 1944, must be considered as one of the measures which the Italian Government is obligated to nullify under Article 78, para. 2, of the Treaty of Peace, as it is admitted, and there is no disagreement on this point, that the measures specified in the Treaty constitute only an example and are not to be considered as a limitation.

" 4.—In order to determine whether or not a measure of requisition comes under the requirements of Article 78, para. 2, of the Treaty of Peace obligating Italy to nullify such measure, the whole of the *ratio legis* of the provision should be considered. This provision is the result of the economic war which has gradually developed more and more since World War I and which has empowered the victorious nations, under all treaties of peace putting an end to hostilities (Treaty of Versailles and others) as well as under the Treaty of Peace drawn up at the conclusion of World War II, to force upon their opponents the cancellation of all measures taken during the war against property considered to be enemy-owned, with the consequent obligations of restoration of all legal rights and interests of the former enemies, of restitution in kind, and, possibly, payment of indemnities in the amounts required by the treaties of peace.

" It is the underlying concept which is found in all parts of treaties of peace dealing with property, rights and interests of United Nations and their nationals in the countries with which they have been at war and which must not be lost sight of in doubtful cases, when deciding whether a measure adopted by the Italian State engages the responsibility of said State and falls under the provisions of the Treaty of Peace.

" 5.—*Ratione temporis,* it cannot be denied that the measure of requisition taken against the claimant's apartment was adopted within the space of time specified in the Treaty of Peace, that is, June 10, 1940, through September 15, 1947, the date of the coming into force of the Treaty; the Decree No. 415 of the Lieutenant of the Realm was in fact enacted on December 28, 1944, and the requisition decree is dated January 18, 1945.

" But this coincidence of time is not sufficient to bring about the application of Article 78, para. 2, of the Treaty of Peace; a true and proper measure of the economic war directed against a national of the United States must be involved.

" The Agent of the plaintiff Government has tried to establish the above fact by contending that Decree No. 415 was not a general law of the Italian State, that it was implemented immediately at Catania and that it was implemented in the remainder of Italy only at a later date; that, further, it was a temporary law as Article 14 thereof limited its duration to one year after the cessation of the state of war; he concludes by stating that the requisition was in fact a special measure directed against a United States national. He further points out that the decisions of the Italian courts which have applied the said Decree show that this action was justified by the events of war, that requisition was ' the result of the very serious lack of available housing caused by the operations of war ' (Tribunal of Tento, Decision of November 3, 1945, in the *Bregoli and Beltrami Case, Giurisprudenza Italiana*, 1946, I, 2, p. 258); the same point of view is shared by Italian qualified legal writings.

" The Agent of the plaintiff Government draws the conclusion that one is undoubtedly faced with a war measure which, even though not preceded or accompanied by seizure, sequestration or control of enemy property, is none the less contemplated by Article 78, para. 2, of the Treaty of Peace which obligates the Italian Government to nullify ' all measures ' resulting from the war, when the conditions of time are fulfilled, and to return the property free of all encumbrances and charges to which it may have become subject as a result of the war. In his opinion, the requisition made in behalf of Dr. Mazza is one of the charges that should be lifted.

" 6.—The Commission finds that it cannot share this view. It is apparent from the very text of Decree No. 415 that there exists no connection with the economic war, as Article 2, para. 1, of said law reads (in translation):

> ' The Housing Commissioner may requisition for use the lodgings available in the commune in order to assign them under a lease to those who are in absolute need thereof and are resident in the commune or have been moved to it by order of the authorities, giving priority to those who were deprived of their dwelling because of the destructions caused by war operations or because of racial or political persecutions.'

" This provision, which is of a legislative nature, was enacted following the housing crisis and simply accords a preference to the victims of the events of war and of political and racial persecutions, regardless of nationality. This law, although the military situation prevailing at the time prevented its immediate implementation throughout Italy, was nevertheless a general law concerning Italian nationals, neutrals and enemy nationals, but not specifically directed against the latter whose property was not made the subject of discrimination thereunder.

" 7.—The rules that must be observed in the subject claim are those contained in the first and second sentences of Article 78, para. 2. It is established therein that the Italian Government shall restore to the United Nations and their nationals their property, rights and interests free of all encumbrances and charges of any kind to which they may have become subject as a result of the war, and that all administrative measures adopted by the Italian Government in this connection during the war shall be nullified.

" 8.—The scope of this provision has given rise to disagreement between the Agents of the two Governments concerned, and this Commission, while appreciating the controversial legal arguments of the parties, believes it should refer to the two legal principles laid down several times in the past in the decisions of the Franco-Italian Conciliation Commission (Decision No. 33 of August 29, 1949, in the *Guillemot-Jacquemin Case*,[1] and Decision No. 95 of March 8, 1951, in the *Società Mineraria e Metallurgica di Pertusola Case*[2]), that is:

" (a) that the responsibility of the Italian Government under Article 78 of the Treaty of Peace can only be engaged when it is proved that there exists a direct link of causality between the measure adopted during the war by the Italian Government against nationals of the United Nations considered as enemies, and the resulting damage to the property, rights and interests of said nationals;

" (b) that the obligations of the Italian State do not include payment of compensation for damage or nullification of the charges imposed on the property of United Nations nationals in cases where said damage or charges are the result of measures adopted under a general legislation, and are devoid of any character of specific war measure adopted against certain property, rights and interests in Italy.

" With reference to the first principle, the Commission must first of all take notice of the fact that neither the Italian Government nor any of its administrative agencies has subjected the claimant's property to any economic war measure whatsoever. Claimant's title to the property has been and is recognized; it has not been subjected to any measure of seizure, sequestration or control. The obligation to restore ' free of all encumbrances and charges to which

[[1] *Recueil des Décisions*, Part I, pp. 45 and 105; *International Law Reports*, 1951, Case No. 127.]

[[2] *Recueil des Décisions*, Part III, p. 67; *International Law Reports*, 1951, Case No. 129 (*sub nom. Pertusola Claim*).]

they may have become subject as a result of the war' (para. 2 of Article 78) requires a few words of comment.

"That the drafters of the Treaty of Peace have placed 'all charges of any kind' and '*hypothèques*' or encumbrances on the same level clearly indicates that they intended to give consideration only to the limitations brought to the assets or to the control of enemy property by measures specifically directed against said property. This is always manifestly the case where a '*hypothèque*' is involved which is at all times a positive guarantee encumbering a specific piece of real property created for equally specific credits; the expression 'all charges of any kind' covers all forms of restriction on property invariably resulting from special measures adopted against property owned by enemy nationals as such, but not from special measures adopted during the war which are not specifically directed against enemy-owned property, even though they are measures of a nature that can also be taken against enemy property. A contrary interpretation would result in removing property owned by the United Nations and their nationals in Italy from the jurisdiction of a large part of Italian legislation enacted during the war to counteract the effects of the war, even though there does not exist an unquestionable link of causality between these measures and the limitation of the owner's rights or the charges he has had to bear.

"Nevertheless, the Agent of the plaintiff Government has not succeeded in establishing an adequate link of causality between the limitations brought to the claimant's right of control over his apartment and the war measure of which he alleges to be the victim. Inasmuch as, during the proceedings, the Commission has failed to find any evidence that measures of such a nature were adopted against the claimant, it would be necessary, in order to establish the Italian Government's responsibility and the resulting obligation to restore the apartment free of requisition, to give the expression 'as a result of the war' a meaning so broad as to become incompatible with the spirit of the Treaty of Peace.

"The Italian-United States Conciliation Commission, as well as the Italo-French Conciliation Commission, have had several occasions in the past to affirm that Article 78, para. 1, of the Treaty of Peace which places on the Italian Government a general obligation to restore legal rights and interests of the United Nations and their nationals in Italy and to return all property owned by said nationals in Italy certainly does not have the purpose of according them the benefits of some kind of general insurance against risks arising out of the war.

"The Commission maintains that it is insufficient to establish an indirect relationship of causality between the existence of a state of war and the requisition of the claimant's apartment by the Italian authorities. The link between cause and effect is too distant to make one believe that the effective cause producing a limitation of the claimant's rights of control over his apartment is as a result of the war, when the requisition measures contemplated by Italian legislation are aimed at protecting the civilian population against the consequences of the war and not to make the conduct of the economic war more effective.

" It is deemed advisable to point out, nevertheless, that the claimant's rights have received due consideration under Article 2, para. 2, of Decree No. 415 of the Lieutenant of the Realm of December 28, 1944, which reads textually (in translation):

> 'The Housing Commissioner may de-requisition the assigned lodging whenever it is proved that it is absolutely necessary for the owner or former tenant to occupy it without delay, provided that another dwelling be assigned to the assignee.'

" In view of the fact that claimant could not produce this proof his civil legal action directed at obtaining the eviction of Dr. Mazza from his apartment failed. Therefore, the state of war was not in itself the determinant factor in keeping the requisition measure in existence, but the fact that the claimant was the owner of other apartments which he could use as living quarters was also given due consideration.

" Lastly, if one considers that under the Italian legislation relating to the extension of leases (Decree No. 669 of the Lieutenant of the Realm of October 12, 1945, and subsequent laws) the tenant had the right to stay in the apartment he had rented, and that even if said apartment had neither been bombed nor requisitioned, the claimant's legal position would be the same as the one in which he stands today, it is evident that his impossibility to regain complete control over his apartment is not the direct consequence of the measures adopted against his property as a result of the war and that Article 78, para. 2, of the Treaty of Peace is not applicable in this case.

" Coming to the second principle, it is important to note that the requisitioning of Mr. Palumbo Corsaro's apartment is the consequence of legislative measures generally applicable in Italy, irrespective of nationality, in order to mitigate, in so far as possible, the lack of available housing brought about by the destruction caused by the war, the massive flow of refugees abandoning the localities in which active warfare was being waged and by individuals fleeing from political and racial persecution.

" The Commission does not wish to affirm undoubtedly by the above that whenever a measure of a general and non-discriminatory nature was taken by Italy during the war this condition is sufficient in itself to make Article 78, para. 2, of the Treaty of Peace inapplicable; or rather that whenever a provision aiming at weakening the enemy's resistance or increasing Italy's war effort is involved this measure shall not give rise, notwithstanding its non-discriminatory character, to an action for restitution, nullification or indemnification if it was adopted against enemy property, rights and interests. This second theory, which was applied in a previous case, to wit, the *Grottanelli Shafer Case* involving requisition of metals regardless of the nationality of the owners or holders thereof (Decision No. 27 of the Italian-United States Conciliation Commission of December 6, 1954[1]) could in no way be invoked in the instant case.

" The requisition of living quarters is in fact of an entirely different nature. In this case there are not only involved measures of a general and non-discriminatory nature which, even if adopted during the war, are not directed against enemy property, but they are measures of assistance inspired by a spirit of solidarity and humanity and are not intended to harm the enemy nor do they contribute to strengthen the war effort of a belligerent State.

" These measures have no other purpose than to alleviate the sufferings caused by the war in providing, even though inadequately, a roof over the heads of civilians whose homes were destroyed by military operations or dispersed by political and racial persecution.

" The above interpretation would be further allowed under the provision of Article 78, para. 4 (*d*), of the Treaty of Peace regarding compensation to be paid by the Italian Government to United Nations nationals who have suffered injury or damage as a result of special measures adopted against their property during the war, because one should not consider as losses those concerning the substance of the property referred to in Article 78, para. 4 (*a*), but those losses which are the result of administrative measures, of a discriminatory treatment adopted against enemy-owned property. It is specifically stated in Article 78, para. 4 (*d*), that the special measures which justify payment of compensation are only those which are adopted against property owned by enemy nationals ' and which are not applicable to Italian property '. If the aforesaid measures concerned both enemy-owned property and Italian-owned property at the same time, their scope was of a general and non-discriminatory nature thereby excluding the payment of compensation to United Nations nationals. The principles of interpretation by analogy permit us to conclude that if limitations on property, rights and interests, irrespective of the nationality of the owner, do not give rise to the right to receive compensation, they should neither give rise to the right of cancellation in all cases where the general and non-discriminatory measures are of a civil character and do not have a direct and adequate relationship with the acts of war.

" 9.—The Commission is of the opinion that the various judicial decisions cited by the Agent of the Government of the United States of America have certain peculiarities which are not to be found in

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[[1] See *International Law Reports*, 1955, p. 959, *sub nom. Shafer Claim*.]

the instant case. In the three cases involving the lifting of sequestration of living quarters before the Italo-French Conciliation Commission, that Commission ruled that in order to obligate the Italian Government to make restitution free of all encumbrances and charges, it was necessary that said Government had previously seized or sequestrated, or placed under control, or had taken possession of the subject living quarters in some other manner. Now, in one of the cases cited, the Italian Government had not adopted any war measure, and the occupation of the premises by third parties was the result of a lease stipulated by the owner before the war, subsequently renewed by his attorney during the war, and finally obligatorily extended under Italian legislation; claim for restitution of the premises was rejected (Decision No. 33 of August 29, 1949, *Guillemot-Jacquemin Case*[1]). The other two cases cited by the Agent of the United States of America involve real property sequestrated by the Italian Government because enemy-owned. In one of the cases the Sequestrator himself had renewed and amended the leases and these measures were to be subject to cancellation together with the lifting of sequestration; and the property was therefore restored free of all leases (Decision No. 85 of September 18, 1950, *Ottoz Case*[2]). The last case involved real and personal property sequestrated by the Italian Government because enemy-owned and subsequently requisitioned by reason of public policy on August 29, 1947, by the President of the Sicilian Region for setting up offices and services in the sequestrated building. When the property was requisitioned, sequestration was legally lifted but this was not followed by the material restoration of the building and the personal property it contained to the owners who were French nationals. The property had been requisitioned but it was encumbered by a measure of sequestration which continued to exist *de facto*; Italy intended to return the property encumbered by a right of use and occupancy for an indefinite duration which constituted a true and proper charge, similar to a positive and permanent right and therefore in contrast with Article 78, para. 2, of the Treaty of Peace; the requisitioning of living quarters in favor of refugees or persecuted individuals was not here involved; furthermore, no court had taken judicial notice of the fact, as in the instant case, that the Sicilian authorities had found it impossible to establish elsewhere the offices and services of the President of the Region. Also in this case restoration of requisitioned property, but placed under a sequestration which in fact had never been lifted, was obligatory because a special measure directed against enemy property was involved; and the Commission so ruled (Decision No. 107 of September 15, 1951, *Heirs of H.R.H. the Duc de Guise Case*[3]).

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[1] [See *supra*, p. 503, n. 1.]

[2] [*Recueil des Décisions*, Part III, p. 22; *International Law Reports*, 1951, Case No. 136.]

[3] [See *supra*, p. 500, n. 2.]

"The case concerning Mr. Palumbo Corsaro's apartment distinctly differs from the *Ottoz* and *Duc de Guise* cases in that the claimant's property was never made the subject of a previous measure of sequestration, seizure or control, nor of any other measure that could have permitted the Italian Government to gain control over said property; it follows that the Italian Government cannot be obligated to make restitution; the claim filed with the Italian Government directed at obtaining the lifting of the sequestration measure which was adopted in behalf of Dr. Mazza finds no support in the Treaty of Peace, as a general legislative measure is here involved which was applicable to all property in Italy and which was taken against the property of a United States national at a time, namely, on the date of the requisition decree, when the American title to the property was in all likelihood unknown to the Italian authorities."

[Report: Unpublished (Decision No. 120).]

NOTE.—The representative of the United States of America appended a dissenting opinion dated May 18, 1956.

Peace Treaties—Peace Treaties of 1919–1923—Treaty of Lausanne, 1923—Effect of, on Transfer of Sovereignty over Certain Territories to Greece.

See p. 659 (*Lighthouses Arbitration between France and Greece*), at p. 667.

Peace Treaties—Retroactive Effect of—Treaty of Athens, 1913.

See p. 659 (*Lighthouses Arbitration between France and Greece*), at p. 665–666.

Peace Treaties—Effect of Provisions of, on State Succession with Regard to Obligations for Torts—Supremacy of General Doctrines of State Succession.

See p. 106 (*Lighthouses Arbitration between France and Greece—Claim No. 12a*).

Peace Treaties—Waiver of Claims Arising Out of Action Taken in Course of Prosecution of War—Whether Administration by Occupant of Occupied Territory After Cessation of Hostilities Constitutes Such Action.

See p. 687 (*Public Trustee* v. *Chartered Bank of India, Australia and China*).

PART IX

INTERNATIONAL ORGANIZATION AND ADMINISTRATION

A—INTERNATIONAL ORGANIZATION IN GENERAL

International Organization—In General—Exemption of International Organizations from Local Jurisdiction—The United Nations—As Liquidator of the United Nations Relief and Rehabilitation Administration—Cause of Action Arising After Immunity Conferred under Municipal Law—The Law of the United States of America.

WENCAK *v.* UNITED NATIONS.

United States, Supreme Court of New York, Special Term.

January 18, 1956.

THE FACTS.—This was an action arising out of an accident on December 1, 1945, for which the plaintiff contended that the United Nations Relief and Rehabilitation Administration was responsible. By the time the action was brought, UNRRA had been liquidated and the United Nations had undertaken, subject to certain conditions, to settle any claims against UNRRA, pursuant to Part I, subparagraph 3 (*f*), of the Agreement between UNRRA and the United Nations concerning the Transfer to the United Nations of the Residual Assets and Activities of the United Nations Relief and Rehabilitation Administration, signed on September 27, 1948 (U.N.T.S., 27 (1949) p. 349). The United Nations moved to dismiss on the ground that it was immune from suit under section 2 of the United States International Organizations Immunities Act (59 Stat. 669, 22 U.S.C. § 288a), which became effective on December 29, 1945. The plaintiff maintained that the statute was inapplicable because the accident on which the claim was based took place before the statute became effective.

Held: that the motion to dismiss must be granted. The cause of action against the United Nations, as distinguished from that against UNRRA, arose after the coming into force of the statute granting immunity to the United Nations and was therefore subject to the statute.

The Court said: " . . . While he [the plaintiff] may have had a cause of action on December 1, 1945, he certainly had none against this defendant on that date. The accident of which he complains involved the United Nations Relief and Rehabilitation Administration, generally called ' Unrra ' [*sic*]. The United Nations is in no sense the successor of Unrra but did undertake to administer the liquidation of that organization. The administration was not an assumption of liabilities upon succession to the assets as is frequently found with business corporations. By treaty dated September 27, 1948, the United Nations agreed to settle such claims as were on the books of Unrra's administrator for liquidation and other claims if there were sufficient funds and it believed the claim to be just. The liquidation lasted some months and the books were closed March 31, 1949. Assuming that these facts might show a cause of action against the United Nations it is clear that such action arose after the immunity statute was in force. Plaintiff claims that there is a different theory of sovereign immunity to-day than existed some years ago. No doubt that is true. But immunity remains a political rather than a legal question, and the extent of it is for the Department of State rather than the courts. As regards this action the department has indicated no limitation of the immunity to be conferred."

[Report: *New York Law Journal*, January 19, 1956, p. 6, col. 7.]

B—THE UNITED NATIONS

I.—Legal Nature of the United Nations. Membership

International Organization—In General—Exemption of International Organizations from Local Jurisdiction—International Refugee Organization—Contract of Employment between International Refugee Organization and Citizen of Host State—Whether Contract Subject to Jurisdiction of Courts of Host State—The Law of Italy.

MAIDA *v.* ADMINISTRATION FOR INTERNATIONAL ASSISTANCE.

Italy, Court of Cassation (United Chambers). May 27, 1955.

THE FACTS.—An Agreement between the International Refugee Organization (I.R.O.) and Italy provided for the usual immunities of the I.R.O. from the jurisdiction of the Italian courts. The Staff Regulations of the I.R.O. provided for arbitration by the Italian Chamber of Advocates in cases of dispute between the I.R.O. and its employees but laid down that, in so far as the Regulations themselves made no provision for the settlement of such disputes, the employees of the I.R.O. " were to refer to the relevant Italian legislation on private employment ". The plaintiff, an Italian citizen, was employed by the I.R.O. as a doctor. A dispute arose between the parties, and the plaintiff brought an action against the I.R.O. in the Civil Labour Court of Naples. That Court, while of opinion that the I.R.O. was not immune from the jurisdiction of the

Italian courts in respect of disputes arising out of contracts of employment between the I.R.O. and its employees, declared itself incompetent and took the view that the case fell within the competence of the Italian administrative courts.

On appeal, the parties agreed that the administrative courts were not competent, but they disagreed on the question of jurisdiction generally. The plaintiff contended that the civil courts were competent whereas the I.R.O. contended that the Italian courts in general were not competent, and that the case could only be determined by arbitration as provided in the Staff Regulations of the I.R.O.

Held: (i) that as the Staff Regulations merely provided for arbitration by the Italian Chamber of Advocates and did not contain any specific provision as to the number of arbitrators or the manner of their appointment, the constitution of an arbitral tribunal was impossible and there could accordingly be no arbitration.

(ii) As the Staff Regulations provided for the subsidiary application of the " relevant Italian legislation on private employment ", such application would result in the competence of the Italian courts.

(iii) The most suitable Italian court to deal with the present dispute was the competent Civil Labour Court and not an administrative court, because administrative courts—so far as concerned labour disputes—were competent to deal only with disputes arising out of contracts of employment with the Italian Government and not those with international organizations.

The Court said: " The parties, Dr. Maida and the Administration for International Assistance (A.A.I.)—the latter being substituted for the International Refugee Organization (I.R.O.) for the purposes of this action—agree that, contrary to the finding of the lower Court, the I.R.O. is not subject to the jurisdiction of the Italian administrative courts in respect of the contract of employment here in issue. On the other hand, they disagree on the finding of the lower Court in the following respect, that whereas the plaintiff contends that the Labour Division of the Civil Court is competent, the A.A.I. contends that the Italian courts in general have no jurisdiction. The A.A.I. says that the plaintiff can have recourse only to the special form of arbitration provided for in Article 9 of the I.R.O. Staff Regulations and entrusted to the Italian Chamber of Advocates (Organo Avvocatura dello Stato italiano). We must draw a distinction, firmly embedded in our jurisprudence and confirmed in recent judgments of this Court, between cases in which a subject of international law acts as such and remains on the plane of international relations in performing sovereign functions incidental to such relations, and cases in which it performs acts of a private character within the ambit of the legal order of another State. In the former case, it must enjoy immunity from the jurisdiction; in the latter, it acts *jure privatorum* and is therefore subject to the jurisdiction of the State in which it has carried on its commercial activity. This rule must be interpreted in the sense that the exemption from the jurisdiction applies unless the subject of international law has waived it. If, on the other hand, it is alleged that the activity is of a commercial character which belongs to the realm of private law, then it must be governed by a treaty or agreement of an international character. On the basis of this rule, and while there is no need to add to the finding of the lower Court that the I.R.O. is a subject of international law, it cannot be said that the contract of employment between the plaintiff and the I.R.O. is inherent in the performance of the official functions of the latter and within its institutional purposes. These purposes consist of a programme of assistance, maintenance, rehabilitation and repatriation of certain classes of refugees from various countries who have come to Italy [and other countries] as a result of the vicissitudes of the last war and for whose benefit a suitable international organization was set up which is recognized by the various States, including Italy. Italy has undertaken to co-operate in the achievement of these purposes by undertaking specific duties and granting various facilities and benefits on Italian territory (Decree Law No. 468 of March 6, 1948). In order to render material assistance to the refugees, Italy has provided medical personnel (doctors and nurses) to serve in the medical establishments of the Organization in the areas in which the latter performs its functions. The contract of employment of these doctors is directly linked with the institutional purposes of the I.R.O., the doctor being appointed for the performance of tasks [sanitary services] within the specific scope for which the Organization has been established. The transaction [contract of employment between the plaintiff and the I.R.O.], therefore, of which the contract to perform professional work forms part, is—so to speak—merged in the public purposes of the international organization, and the rule of exemption from the jurisdiction should accordingly apply unless the I.R.O. has waived its immunity. In the present case the plaintiff contends that the I.R.O. has waived its immunity. This is strongly contested by the A.A.I., respondents herein, who also say that the acceptance of the jurisdiction of the Italian courts by the I.R.O. would not make the plaintiff's claim admissible. This Court is of opinion that everything in this case suggests that we are concerned with a special régime governing a subject of international law which differs from the general rule governing sovereign States and other subjects of international law, whose autonomy—at least in principle—in the exercise of their public functions in the territory of another State we have preserved intact. This special régime is inherent in the special nature of the aims pursued by the I R.O. and which the Italian Government, in active co-operation with the other member States, intended to further on Italian territory.

" By means of the aforementioned Decree Law No. 468 of March 6, 1948, the Italian Government gave legislative recognition to the international character of the I.R.O. and granted to its director and chief executive officers of other than Italian nationality who were not permanently resident in Italy the immunities, facilities and privileges normally enjoyed by diplomatic missions. In order to ' co-operate in the programme of the I.R.O. within the limits of its own jurisdiction ', the Italian Government granted facilities of the most varied kind: free use of immovable and movable property (in respect of which it undertook to bear the whole cost), immunity from taxes and duties, railway facilities, and other services. All this was inherent in the discharge of the functions of this international organization. Further, to facilitate the discharge of the functions of the I.R.O., the Italian Government also ensured the latter's protection from suit, whether as plaintiff or defendant, in all actions concerning the Organization itself or its personnel in Italy so far as concerns the official functions of the Organization. However, while giving all effective assistance to the I.R.O. by means of the above-mentioned Agreement (*sic*) of March 6, 1948, provision was made that the functions and activities of the I.R.O. were to be carried out in accordance with the laws and international obligations undertaken or to be undertaken by Italy, and that the I.R.O. would be responsible for all damage resulting, within the meaning of Italian law, from the negligence of its own personnel or the refugees. As the I.R.O., for the purpose of carrying out its functions, employed many persons of different callings [manual and other workers], and as the Italian Government undertook to give to the I.R.O. every possible assistance in the selection and appointment of qualified Italian citizens, it was provided that there should be applicable to these all the privileges of social insurance provided by Italian law for employees of private Italian firms. The I.R.O. then laid down in detail, in its Internal Staff Regulations of April 13, 1951, the conditions of employment and provided that, in so far as no provision was made in these Regulations, the Organization or the employees should refer to the relevant Italian legislation on private employment. It accordingly follows that the I.R.O., notwithstanding that it is a subject of international law, placed itself indirectly and in a subsidiary manner under Italian law in certain respects. This fact must serve as a guide in the present case to determine the competent body which can decide the dispute between the I.R.O. and the plaintiff. Article 9 of the above-mentioned Staff Regulations provides that in cases of dispute between the employee and the Organization, the employee may present his case to the Personnel Office of the Organization and, if he does not accept its decision, ' may submit a request for arbitration to the Italian Chamber of Advocates '.

" The present serious and irreconcilable dispute between the parties turns on the nature and compulsory character of this arbitration. The defendants contend that this arbitration automatically excludes the jurisdiction of the Italian courts and that the I.R.O. has created its own special tribunal for the determination of disputes with its personnel, within the framework of its own public organization. The plaintiff, on the other hand, denies the effect of the Internal Regulations of the I.R.O., which have been laid down unilaterally and cannot bind the Italian State; Italian law need not recognize such Regulations as would be contrary to Articles 24 and 25 of the Constitution whereby all persons are entitled to invoke the jurisdiction of the courts for the protection of their rights and nobody can be deprived of the right to appeal to the Judge appointed by law. According to the plaintiff, the arbitration here relied upon is therefore only voluntary [the employee ' may . . .'], and, in particular, arbitration is prohibited in cases concerning contracts of employment [Article 806 of the Code of Civil Procedure]. The Court is of opinion that the contentions of the plaintiff lose their force where we are concerned, as is undoubtedly the case here, in regard to services which are inherent in the performance of the public functions of an international person which, within the framework of its own organization, has provided for a method of solving such disputes. No valid argument can be derived from the word ' may ' in order to prove the voluntary nature of the arbitration in the present case; once the sovereign will of the I.R.O. has been recognized in respect of contracts with its own personnel, the procedure laid down by the I.R.O. would be the only means open to an employee to assert his rights. Lastly, the exclusion of the right to settle by arbitration labour disputes which are or may be governed by collective agreements, however binding in municipal law, cannot be binding in all cases concerning international relations. Italian law governing private employment can be relied upon in so far as the internal law of the international person makes no other provision. It seems to the Court that the decisive factor militating against the legality of the arbitration in the present case, as provided in Article 9 of the Staff Regulations of the I.R.O., is the fact that it is contrary to the basic requirements underlying the constitution of any arbitral tribunal. In fact, the arbitration in the present case is entrusted [as the Regulations provide] ' to the Italian Chamber of Advocates '. Nothing further is said, and in particular there is no provision as to whether there shall be a sole arbitrator or several arbitrators (in the latter case the number of arbitrators should have been stated), and by whom the arbitrators are to be appointed. These particulars are indispensable because the Italian Chamber of Advocates consists of a large elected body . . ."

The Court then dealt in greater detail with those aspects of Italian law which caused it to conclude that an arbitral tribunal as provided for in the Staff Regulations of the I.R.O. could not be constituted. As, according to those Regulations, Italian law was to apply to the extent that the Regulations themselves made no provision, the Court then had to determine the question whether jurisdiction was vested in the administrative or the civil courts. The Court continued: " As disputes concerning contracts of employment with the Italian State are made subject to the jurisdiction of the administrative courts and as in this case one of the parties is a subject of international law which is outside the administrative organization of that State, this Court considers it more consonant with principle to refer this case to the ordinary courts, having regard to the universal character of the jurisdiction of those courts which is limited only in so far as the law expressly precludes it.

The question of jurisdiction must be determined in this sense and the finding of the labour Tribunal of Naples modified in so far as it declared itself incompetent (and held jurisdiction to be vested in the administrative courts).

[Report: *Rivista di Diritto internazionale*, 39 (1956), p. 546.]

United Nations—Legal Nature of—United Nations Korean Reconstruction Agency—Capacity to Institute Legal Proceedings in a National Court—Subjection to Same Requirements as Citizens of Nation Concerned—The Law of the United States of America.

United Nations Korean Reconstruction Agency *v.* Glass Production Methods, Inc., *et al.*

United States, District Court, Southern District, New York.

August 3, 1956.

The Facts.—This was an action by an international organization against a corporation domiciled in New York and against three individuals, two of whom were residents of Connecticut. 22 U.S.C. § 288a, 59 Stat. 669, accords the privilege of instituting legal proceedings in courts of the United States to international organizations designated by the President.[1]

The plaintiff contended that the Federal District Court had jurisdiction of the action by virtue of 28 U.S.C. § 1331, 62 Stat. 930, which granted to that Court original jurisdiction of all civil actions wherein the matter in controversy exceeded $3,000 in value and arose under the Constitution, laws, or treaties of the United States. A venue requirement was imposed by 28 U.S.C. 1391 (b), 62 Stat. 935, which provided that a civil action wherein jurisdiction was not based solely on diversity of citizenship could be brought only in the judicial district where all the defendants resided.

The individual defendants, who were residents of Connecticut, moved to dismiss the action for improper venue. The plaintiff contended that the statute granting to international organizations the power to institute proceedings was intended to afford access to federal courts irrespective of venue requirements.

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[1] The United Nations had been so designated by Executive Order No. 9698 of February 19, 1946 (11 Fed. Reg. 1809 (1946)).

Held: that the action must be severed and transferred to the District Court of Connecticut as to the two defendants who resided there. The statute granting the privilege of instituting legal proceedings to international organizations did not alter normal venue requirements nor provide exemption therefrom. International organizations possessed no greater rights in this respect than those of United States citizens or of the United States Government.

The Court said: " It is clear that this is a civil action arising under the treaties creating the United Nations and the law permitting international organizations to institute legal proceedings in the Federal Courts. *International Refugee Organization* v. *Republic S. S. Corp.*, 4 Cir., 1951, 189 F.2d 858.[1] However, the issue to be determined is the propriety of the venue with respect to the individual defendants. . . .

" It is clear that for venue purposes, a person is a resident only where he is a citizen and domiciled. *Townsend* v. *Bucyrus-Erie Co.*, 10 Cir., 1944, 144 F.2d 106; *Koons* v. *Kaiser*, D.C.S.D.N.Y., 1950, 91 F.Supp. 511. Since the individual defendants make their home in Connecticut and are domiciled in said state, it necessarily follows that the venue of this suit is improper since all of the defendants are not residents of the Southern District of New York and were not such residents when this action was commenced.

" Plaintiff's contention that the purpose of the International Organizations Immunities Act, 22 U.S.C.A. § 288 *et seq.*, was to ' open the doors of the United States courts to the United Nations and its organizations,' irrespective of federal venue statutes, is unsubstantiated. Even the United States, when it commences an action, must comply with the federal venue statutes. *Davidson Bros. Marble Company* v. *United States, ex rel. Gibson*, 213 U.S. 10, 29 S.Ct. 324, 53 L.Ed. 675. This Court does not believe that, in enacting 22 U.S.C.A. § 288, *et seq.*, Congress intended to confer upon organizations of the United Nations greater privileges than are afforded citizens of the United States or the United States Government itself. . . ."

[Report: 143 F.Supp. 248.]

United Nations—Legal Nature of—Immunity from Local Jurisdiction.

See p. 509 (*Wencak* v. *United Nations*).

[1 See *International Law Reports*, 1951, Case No. 140.]

II.—The General Assembly

United Nations—General Assembly—Powers of—Supervision of Mandates System.

See p. 38 (*Admissibility of Hearings of Petitioners by the Committee on South-West Africa*).

C—SPECIALIZED AGENCIES OF THE UNITED NATIONS

International Organization—Specialized Agencies—United Nations Educational, Scientific and Cultural Organization—Dismissal of Officials—Non-renewal of Appointment—Reason for—Administrative Tribunal of the International Labour Organization—Awards of—Appeal against—Excess of Powers—Appeal by Way of Advisory Opinion of International Court of Justice—Binding Force of Opinions as Laid Down in Statute of Tribunal—Whether Inconsistent with Statute of the Court—Equality of the Parties and Advisory Jurisdiction of the Court—Oral Proceedings in the Course of Advisory Jurisdiction.

JUDGMENTS OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION UPON COMPLAINTS MADE AGAINST THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION.

International Court of Justice. Advisory Opinion of October 3, 1956.

(Hackworth, President; Badawi, Vice-President; Judges Basdevant, Winiarski, Zoričič, Klaestad, Read, Armand-Ugon, Kojevnikov, Sir Muhammad Zafrulla Khan, Sir Hersch Lauterpacht, Moreno Quintana, Córdova.)

THE FACTS.—By a Resolution of November 25, 1955, the Executive Board of the United Nations Educational, Scientific and Cultural Organization adopted the following Resolution:

" *The Executive Board*,

" *Whereas*, by its Judgments Nos. 17, 18 and 19 of 26 April 1955, and No. 21 of 29 October 1955, the Administrative Tribunal of the International Labour Organisation confirmed its jurisdiction in the complaints introduced by Messrs. Duberg and Leff and Mrs. Wilcox and Mrs. Bernstein against the United Nations Educational, Scientific and Cultural Organization,

" *Whereas* Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation provides as follows:

" ' 1. In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the

Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.

" ' 2. The opinion given by the Court shall be binding.'

" *Whereas* the Executive Board, after consideration, wishes to avail itself of the provisions of the said Article,

" *Decides* to submit the following legal questions to the International Court of Justice for an advisory opinion:

" Having regard to the Statute of the Administrative Tribunal of the International Labour Organisation;

" Having regard to the Staff Regulations and Staff Rules of the United Nations Educational, Scientific and Cultural Organization, and to any other relevant texts;

" Having regard to the contracts of appointment of Messrs. Duberg and Leff and Mrs. Wilcox and Mrs. Bernstein:

" I.—Was the Administrative Tribunal competent, under Article II of its Statute, to hear the complaints introduced against the United Nations Educational, Scientific and Cultural Organization on 5 February 1955 by Messrs. Duberg and Leff and Mrs. Wilcox, and on 28 June 1955 by Mrs. Bernstein?

" II.—In the case of an affirmative answer to question I:

" (*a*) Was the Administrative Tribunal competent to determine whether the power of the Director-General not to renew fixed-term appointments has been exercised for the good of the service and in the interest of the Organization?

" (*b*) Was the Administrative Tribunal competent to pronounce on the attitude which the Director-General, under the terms of the Constitution of the United Nations Educational, Scientific and Cultural Organization, ought to maintain in his relations with a Member State, particularly as regards the execution of the policy of the Government authorities of that Member State?

" III.—In any case, what is the validity of the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21?"

The further facts are stated as follows in the words of the Opinion of the Court:

" The Resolution of November 25th, 1955, by which the Executive Board of Unesco requested an Advisory Opinion of the Court, relies on Article XII of the Statute of the Administrative Tribunal which as cited in the Resolution and as applicable to Unesco reads:

> " ' 1. In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.
>
> ' 2. The opinion given by the Court shall be binding.'

" Paragraph 5 of Article II, to which reference is made in Article XII, reads:

> " ' 5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other intergovernmental international organisation approved by the Governing Body which has addressed to the Director-General a declaration recognising, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure.'

" Furthermore, Article II, paragraph 7, reads:

> " 7. Any dispute as to the competence of the Tribunal shall be decided by it, subject to the provisions of Article XII."

" Unesco recognised the jurisdiction of the Administrative Tribunal by making the declaration provided for in Article II, paragraph 5, of the Statute of the Tribunal.

" Relying on Article XII quoted above, the Resolution of the Executive Board challenged Judgments Nos. 17, 18 and 19 given on April 26th, 1955, in the matter of the complaints of Mr. Peter Duberg, Mr. David Leff and Mrs. Wilcox, and Judgment No. 21 given on October 29th, 1955, in the matter of the complaint of Mrs. Bernstein.

" The facts underlying the complaints were essentially the same in all four cases and it is therefore sufficient to state them by reference to one of the cases decided by the Tribunal, namely, that of Mr. Peter Duberg (Judgment No. 17).

" Duberg obtained a fixed-term appointment with Unesco on June 22nd, 1949. That appointment, subsequently renewed, was due to expire on December 31st, 1954. In February 1953 Duberg received from the representative of the United States to Unesco a questionnaire to be completed and returned in pursuance of an Executive Order of the President of the United States of January 9th, 1953, prescribing procedures for making available to the Secretary-General of the United Nations certain information concerning United States citizens employed or being considered for employment on the Secretariat of the United Nations. By virtue of Part 3 of that Order, its provisions were made applicable to Unesco. The complainant did not answer the questionnaire. In February 1954 the complainant received a questionnaire from the International Organizations Employees Loyalty Board of the United States Civil Service Commission set up by Executive Order. He did not reply to the questionnaire. In June 1954 he received an invitation to appear before the Loyalty Board at the United States Embassy in Paris. On July 13th, 1954, the complainant informed the Director-General of Unesco of his decision to refuse to appear before the Board and of the reasons of conscience which caused him to take that decision. Previously, on July 6th, 1954, the Director-General had issued an

Administrative Memorandum on the subject of the renewal of appointments expiring at the end of 1954. In that Memorandum the Director-General had stated that 'he has decided that all professional staff members whose contracts expire between now and June 30th, 1955 (inclusive), and who have achieved the required standards of efficiency, competence and integrity and whose services are needed, will be offered one-year renewals of their appointments'. By a letter dated August 13th, 1954, the Director-General informed Duberg that he would not offer him a new appointment on the expiry of his contract. This letter stated, *inter alia*, as follows:

> '. . . In the light of what I believe to be your duty to the Organization, I have considered very carefully your reasons for not appearing before the International [Organizations] Employees Loyalty Board where you would have had an opportunity of dispelling suspicions and disproving allegations which may exist regarding you.
>
> 'It is with a deep sense of my responsibilities that I have come to the conclusion that I cannot accept your conduct as being consistent with the high standards of integrity which are required of those employed by the Organization.
>
> 'I have, therefore, to my regret, to inform you that I shall not offer you a further appointment when your present appointment expires . . .'

Following an unsuccessful application to the Director-General to reconsider his decision, Duberg submitted an appeal to the Unesco Appeals Board, asking that the decision of the Director-General be rescinded. On November 2nd, 1954, the Appeals Board, by a majority, expressed the opinion that the decision should be rescinded. On November 25th, 1954, the Director-General informed the Chairman of the Appeals Board that he was unable to act in accordance with its opinion. On February 5th, 1955, Duberg brought his complaint before the Administrative Tribunal.

"In its Judgment of April 26th, 1955, the Administrative Tribunal declared itself competent to entertain the complaint. It gave the following reasons for its decision:

> "'ON COMPETENCE
>
> 'Considering that the character of a fixed-term appointment is in no way that of a probationary appointment, that is to say of a trial appointment;
>
> 'That while it is the case that Unesco Staff Rule 104.6 issued in application of the Staff Regulations stipulates that: "A fixed-term appointment shall expire, without notice or indemnity, upon completion of the fixed term . . .", this text only deals with the duration of the appointment and in no way bars the Tribunal from being seized of a complaint requesting the examination of the validity of the positive or negative decision taken regarding the renewal of the said appointment;
>
> 'That it is established in the case that the Director-General, by a general measure of which the whole staff was informed on 6 July 1954, "decided that all professional staff members whose contracts expire between now and 30 June 1955 (inclusive) and who have achieved the

required standards of efficiency, competence and integrity and whose services are needed, will be offered one-year renewals of their appointments ";

'That the complainant, having been made the object of an exception to this general measure, holds that the Director-General could not legitimately thus make an exception of him on the sole ground which he invoked against him as justification for the view that he did not possess the quality of integrity recognised in those of his colleagues whose contracts had been renewed, and in the absence of any contestation of his qualities of competence and efficiency;

'That the complainant requests that this decision be rescinded and, alternatively, that an indemnity be granted;

'Considering that the question is thus a dispute concerning the interpretation and application of the Staff Regulations and Rules of the defendant Organisation;

'That by virtue of Article II, paragraph 1, of its Statute, the Tribunal is competent to hear the said dispute;'

" After having declared itself competent, the Tribunal gave a decision on the merits of the complaint. The Court is not called upon to express an opinion on that part of the Judgment.

Held: by nine votes to four, to comply with the Request for an Advisory Opinion;

" *With regard to Question I:* by ten votes to three, that the Administrative Tribunal of the International Labour Organisation was competent, under Article II of its Statute, to hear the complaints introduced against the United Nations Educational, Scientific and Cultural Organization on February 5th, 1955, by Messrs. Duberg and Leff and Mrs. Wilcox, and on June 28th, 1955, by Mrs. Bernstein;

" *With regard to Question II:* by nine votes to four, that this question does not call for an answer by the Court;

" *With regard to Question III:* by ten votes to three, that the validity of the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21 is no longer open to challenge.

The Court said: " In formulating the Request for an Advisory Opinion, the Executive Board exercised a power conferred upon Unesco by Article XI of the Agreement between that Organization and the United Nations, approved by the General Assembly on December 14th, 1946. The General Conference, by its amendment of Article V of the Constitution of November 16th, 1945, by which Unesco was brought into being, authorised the Executive Board to exercise that power between sessions of the General Conference.

" The Court will consider at the outset whether it should comply with the Request for an Opinion.

" The question put to the Court is a legal question. It arose within the scope of the activities of Unesco when the Executive Board had to examine the measures to be taken as a result of the four Judgments. The answer given to it will affect the result of the challenge raised by the Executive Board with regard to these Judgments. In submitting the Request for an Opinion the Executive Board was seeking a clarification of the legal aspect of a matter with which it was dealing.

" Under Article XII of the Statute of the Administrative Tribunal, the Opinion thus requested will be ' binding '. Such effect of the Opinion goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion. However, the provision in question is nothing but a rule of conduct for the Executive Board, a rule determining the action to be taken by it on the Opinion of the Court. It in no wise affects the way in which the Court functions; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself. Accordingly, the fact that the Opinion of the Court is accepted as binding provides no reason why the Request for an Opinion should not be complied with.

" The Court is a judicial body and, in the exercise of its advisory functions, it is bound to remain faithful to the requirements of its judicial character. Is that possible in the present case ?

" The four Judgments referred to in the Request for an Opinion are, under Article VI, paragraph 1, of the Statute of the Tribunal, ' final and without appeal '. However, Article XII, paragraph 1, of the Statute, in so far as it was relied upon by Unesco, confers upon the Executive Board the right to challenge ' a decision of the Tribunal confirming its jurisdiction ' and provides that the Executive Board shall submit its challenge to the Court by means of a Request for an Advisory Opinion. The Executive Board has availed itself of that right.

" The advisory procedure thus brought into being appears as serving, in a way, the object of an appeal against the four Judgments, seeing that the Court is expressly invited to pronounce, in its Opinion, which will be ' binding ', upon the validity of these Judgments.

" Article XII of the Statute of the Administrative Tribunal was designed to provide that certain challenges relating to the validity of Judgments renderd by the Tribunal in proceedings between an official and the international organization concerned should be brought before the Court and decided by it. However, under Article 34, paragraph 1, of the Statute of the Court ' only States may be parties in cases before the Court '. In Article XII it was sought to avoid this difficulty while nevertheless securing an examination by and a decision of the Court by means of a Request, emanating from the Executive Board, for an Advisory Opinion. To the Executive Board—and to it alone—was given the right of challenging a Judgment of the Administrative Tribunal. The special feature of this procedure is that advisory proceedings take the place of contentious proceedings which would not be possible under the Statute of the Court.

" The Court is not called upon to consider the merits of such a procedure or the reasons which led to its adoption. It must consider only the question whether its Statute and its judicial character do or do not stand in the way of its participating in this procedure by complying with the Request for an Advisory Opinion.

" According to generally accepted practice, legal remedies against a judgment are equally open to either party. In this respect each possesses equal rights for the submission of its case to the tribunal called upon to examine the matter. This concept of the equality of parties to judicial proceedings finds, in a different sphere, an expression in Article 35, paragraph 2, of the Statute of the Court which, when providing that the Security Council shall lay down the conditions under which the Court shall be open to States not parties to the Statute, adds ' but in no case shall such conditions place the parties in a position of inequality before the Court '. However, the advisory proceedings which have been instituted in the present case involve a certain absence of equality between Unesco and the officials both in the origin and in the progress of those proceedings.

" In the first place, in challenging the four Judgments and applying to the Court, the Executive Board availed itself of a legal remedy which was open to it alone. Officials have no such remedy against the Judgments of the Administrative Tribunal. Notwithstanding its limited scope, Article XII of the Statute of the Administrative Tribunal in this respect confers an exclusive right on the Executive Board.

" However, the inequality thus stated does not in fact constitute an inequality before the Court. It is antecedent to the examination of the question by the Court. It does not affect the manner in which the Court undertakes that examination. Also, in the present case, that absence of equality between the parties to the Judgments is somewhat nominal since the officials were successful in the proceedings before the Administrative Tribunal and there was accordingly no question of any complaint on their part. This being so, it is not necessary for the Court to express an opinion upon the legal merits of Article XII of the Statute of the Administrative Tribunal. The Court must confine itself to the facts of the present case. In this respect, it is enough for it to state that the circumstance that only the Executive Board was entitled to institute the present proceedings does not constitute a reason for not complying with the Request for an Advisory Opinion.

" The question of equality between Unesco and the officials arises once more in connexion with the actual procedure before the Court. Here the absence of equality flows not from any provision of the Statute of the Administrative Tribunal but from the provisions of the Statute of the Court. In the form of advisory proceedings, the Court has before it a challenge the result of which will affect the right of the officials to the benefit of the Judgments of the Tribunal and the obligation of Unesco to comply with them. The judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court.

" In the case of Unesco, the Statute and the Rules of Court constitute no obstacle in this respect. Indeed, they make available to it the necessary facilities. In the case of the officials, the position is different.

" It was with that difficulty that the Court was confronted. The difficulty was met, on the one hand, by the procedure under which the observations of the officials were made available to the Court through the intermediary of Unesco and, on the other hand, by dispensing with oral proceedings. The Court is not bound for the future by any consent which it gave or decisions which it made with regard to the procedure thus adopted. In the present case, the procedure which has been adopted has not given rise to any objection on the part of those concerned. It has been consented to by counsel for the officials in whose favour the Judgments were given. The principle of equality of the parties follows from the requirements of good administration of justice. These requirements have not been impaired in the present case by the circumstance that the written statement on behalf of the officials was submitted through Unesco. Finally, although no oral proceedings were held, the Court is satisfied that adequate information has been made available to it. In view of this there would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized to ask for an Advisory Opinion of the Court. Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials. Any seeming or nominal absence of equality ought not to be allowed to obscure or to defeat that primary object.

" In the light of what has been said above and of the circumstances of the present case, the Court considers that it ought to comply with the Request for an Opinion.

" The first question put to the Court is in the following terms:

" ' I.—Was the Administrative Tribunal competent, under Article II of its Statute, to hear the complaints introduced against the United Nations Educational, Scientific and Cultural Organization on 5 February 1955 by Messrs. Duberg and Leff and Mrs. Wilcox, and on 28 June 1955 by Mrs. Bernstein? '

The Court is here invited to pass upon the competence of the Administrative Tribunal. Article XII of the Statute of that Tribunal on which the Request is based shows that what is involved is the decision of the Tribunal confirming its jurisdiction, that is, the operative part of its Judgment on this point. The Court is not confined to an examination of the grounds of decision expressly invoked by the Tribunal; it must reach its decision on grounds which it considers decisive with regard to the jurisdiction of the Tribunal.

" The words ' competent to hear ' used in the Request for an Opinion mean that the question is one of determining whether the Administrative Tribunal was legally qualified to examine the complaints submitted to it and to adjudicate on the merits of the claims set out therein. The circumstance that the Tribunal may have rightly or wrongly adjudicated on the merits or that it may have rightly or wrongly interpreted and applied the law for the purposes of determining the merits, in no way affects its jurisdiction. The latter is to be judged in the light of the answer to the question whether the complaint was one the merits of which fell to be determined by the Administrative Tribunal in accordance with the provisions governing its jurisdiction. That distinction between jurisdiction and merits is of great importance in the legal régime of the Administrative Tribunal. Any mistakes which it may make with regard to its jurisdiction are capable of being corrected by the Court on a Request for an Advisory Opinion emanating from the Executive Board. Errors of fact or of law on the part of the Administrative Tribunal in its Judgments on the merits cannot give rise to that procedure. The only provision which refers to its decisions on the merits is Article VI of the Statute of the Tribunal which provides that its judgments shall be ' final and without appeal '.

" Before the Administrative Tribunal the officials concerned complained of the refusal to renew their fixed-term contracts, a refusal which they encountered in the circumstances as recalled. They challenged before the Appeals Board the argument that the holder of a fixed-term contract had no right to the renewal of his contract. They alleged that, on the contrary, they had an acquired right to the renewal of their contracts. In doing so they relied, apart from the general considerations relating to the international civil service and the practice of international organizations, on the position taken with regard to the renewal of fixed-term contracts by the Director-General in the Administrative Memorandum of July 6th, 1954, and on a document submitted by him to the General Conference which refers, in this connexion, to Staff Regulation 4.5.1. Their position, on this point, before the Administrative Tribunal appears clearly when it is borne in mind that they had been successful before the Appeals Board and that the latter, on this point, had given as a reason for its opinion the meaning which it attached to

Staff Regulation 4 and to Staff Rule 52 On the other hand, the written answer of Unesco, in challenging the case for the complainants, relied on the interpretation which it put upon Staff Regulation 4.5.1, on certain provisions of the Staff Rules, and, primarily, on the meaning which it attributed to fixed-term contracts. All this serves to bring out the issue of which the Administrative Tribunal was seised. The Court has to consider whether the examination of these complaints fell within the jurisdiction of the Administrative Tribunal under Article II, paragraph 5, of its Statute which provides: ' The Tribunal shall . . . be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations . . .'

" The Court cannot attach to this provision any purely formal meaning so as to require that the official should expressly indicate in his complaint the particular term or provision on which he intends to rely. In the first place, what must be alleged, according to Article II, paragraph 5, is non-observance, namely, some act or omission on the part of the Administration; in the present case, the complainant invoked the refusal to renew his contract. Secondly, the Tribunal is entitled to ascertain and to determine what are the texts applicable to the claim submitted to it. In order to admit that the Tribunal had jurisdiction, it is sufficient to find that the claims set out in the complaint are, by their nature, such as to fall within the framework of Article II, paragraph 5, of the Statute of the Administrative Tribunal in the sense indicated in another part of this Opinion.

" According to the words of this provision, it is necessary, in order to establish the jurisdiction of the Tribunal to hear a complaint by an official, that he should allege non-observance of the terms or provisions therein referred to. ' Complaints alleging ' is a wider expression than ' complaints based on '. The latter may be interpreted as meaning that the object of such a complaint must be legally well-founded. Yet the Court, when confronted with the words ' claims . . . based on the provisions ' of a treaty, considered that these words ' cannot be understood as meaning claims actually supportable under that Treaty ' (*Ambatielos case, Merits: Obligation to arbitrate*, I.C.J. *Reports* 1953, p. 17). This is particularly true in the case of the more flexible expression ' complaints alleging '. These words refer to what the complainant alleges—to that on which he relies for the purpose of supporting his complaint. But Article II, paragraph 5, does not mean that a mere verbal reference to certain terms or provisions would suffice to establish the jurisdiction of the Administrative Tribunal. A mere allegation by the complainant cannot be sufficient to cause the Tribunal to accept it for the purpose of examining the complaint. In the Judgment previously referred to, the Court, in construing the expression ' based on ', said that ' it is not enough for the claimant Government to establish a remote connexion between the facts of the claim and the Treaty ' invoked. However, it proceeded to add that ' it is not necessary for that Government to show . . . that an alleged treaty violation has an unassailable legal basis ' (*ibid.*, p. 18). Similarly, in applying Article II, paragraph 5, the Court considers that this intermediate position must be adhered to, namely, that it is necessary that the complaint should indicate some genuine relationship between the complaint and the provisions invoked, but that it is not required that the facts alleged should necessarily lead to the results alleged by the complainants. Any such requirement would confuse the question of jurisdiction with that of the substance.

" In the cases here in question, the officials put forward an interpretation of their contracts and of the Staff Regulations to the effect that they had a right to the renewal of their contracts. They alleged that the Administrative Memorandum was complementary to their contracts and to the Staff Regulations and that it gave them a legal right to renewal. The correctness of these allegations constitutes the substance of the issue which they submitted to the Tribunal. In order to determine the jurisdiction of the Tribunal, it is necessary to ascertain whether the terms and the provisions invoked appear to have a substantial and not merely an artificial connexion with the refusal to renew the contracts.

" In the light of what has been said above, the Court will now examine the question whether, for the purpose of accepting jurisdiction, the Administrative Tribunal was entitled to find that there existed before it a complaint sufficient to bring it within the scope of (*a*) ' terms of appointment ' or (*b*) ' Staff Regulations '. These two aspects of the question will be considered in turn.

" Duberg's contract, as renewed on the last occasion, was due to expire on December 31st, 1954. He maintained that that contract gave him a right to a renewal of the contract. Was that assertion sufficiently well-founded to establish the competence of the Administrative Tribunal? For that purpose, it was necessary that the assertion should have some serious juridical basis. The question of renewal arose at the time when Duberg's contract was still in force. It was in August 1954 that the decision not to renew his contract was taken; that decision was subsequently confirmed and maintained after November 25th, 1954, following upon the opinion of the Appeals Board invoked by Duberg; Duberg's contract did not expire until December 31st, 1954. Furthermore, the contract of employment expressly refers to the Staff Regulations and Rules, as well as to any amendments thereto. The expression ' terms of appointment ' which is used in the English text of the Statute of the Administrative Tribunal and which also appears in the document relating to Duberg's engagement—an expression which seems to be both wider and more appropriate than the expression ' *stipulations* *du contrat d'engagement'*—must be understood in relation to the attitude assumed in the matter by the Director-General. Now the latter, in his Administrative Memorandum of July 6th, 1954, adopted a position with regard to the renewal of fixed-term contracts. He announced and brought to the knowledge of the staff his intention to offer a renewal of these contracts under certain specified conditions. This signified, on his part, a decision to recognize or establish a link between the contracts which were due to expire and their renewal. What was the nature of that link? Did it go so far as to confer upon Duberg a legal right to obtain the renewal of his contract? These questions are sufficiently related to the interpretation of the contract of employment, in terms of its observance or non-observance, to permit a finding that they fell within the competence of the Administrative Tribunal. In saying this, the Court does not pass on the question whether Duberg fulfilled the conditions required in the Administrative Memorandum for the renewal of his contract. That question is not before the Court.

"The Court cannot admit that in order to appreciate the legal situation in the matter it is possible to attach exclusive importance to the letter of the contracts in question and, in particular, to the provision according to which, in case of non-renewal, these contracts expire automatically on the date fixed. The officials claimed to derive a right to renewal from their fixed-term contracts. They complained of the fact that such renewal was denied to them and it was that refusal which they regarded as non-observance of their contracts. It is clear that the mere expiry of the term fixed in the contract could not have the effect of nullifying this non-observance occurring, if in fact it did occur, before the expiry date and of depriving the officials of their right to complain of it before the Administrative Tribunal. In fact, Article II, paragraph 6, of its Statute provides: 'The Tribunal shall be open: (*a*) to the official, even if his employment has ceased . . .'

"The Court is of the opinion that, in order to decide on the competence of the Administrative Tribunal, it is necessary to consider these contracts not only by reference to their letter but also in relation to the actual conditions in which they were entered into and the place which they occupy in the Organization.

"In the practice of Unesco—as well as in the practice of the United Nations and of the Specialized Agencies—fixed-term contracts are not like an ordinary fixed-term contract between a private employer and a private employee. At the crucial period a large number of the employees of Unesco held fixed-term contracts. A similar situation seems to have obtained in the United Nations and in the Specialized Agencies. There is no need here to go into the reasons which have prompted that form of contracts. The fact is that there has developed in this matter a body of practice to the effect that holders of fixed-term contracts, although not assimilated to holders of permanent or indeterminate contracts, have often been treated as entitled to be considered for continued employment, consistently with the requirements and the general good of the organization, in a manner transcending the strict wording of the contract. In a document entitled 'Personnel Recruitment Standards and Methods', which was submitted, under the authority of the Director-General, to the General Conference at its Eighth Session in 1954, it was stated in paragraph 26 that 'the existing Regulation 4.5.1. adopted by the Seventh Session of the General Conference, obliges the Director-General to give indeterminate appointments to all staff members after they have satisfactorily completed a fixed-term appointment of one to three years, unless he considers that' in the light of programme requirements, 'he should only give a further fixed-term appointment'. In paragraph 14 of the same document may also be noted the statement that 'if a staff member has fulfilled his duties efficiently and his conduct is satisfactory, his appointment is, in most cases, renewed'. At the Seventeenth Meeting of the Administrative Commission during the Eighth Session of the General Conference the Director-General stated on November 29th, 1954, 'that, under the existing paragraph 4.5.1 of the Staff Regulations, he was under an obligation to renew a contract for an indeterminate period (provided the person satisfied all the requirements), unless he could invoke programme needs as a reason for not doing so'. The practice as here surveyed is a relevant factor in the interpretation of the contracts in question. It lends force to the view that there may be circumstances in which the non-renewal of a fixed-term contract provides a legitimate ground for complaint.

" The practice referred to above should serve as a warning against an interpretation of the contract of employment which, by considering exclusively the literal meaning of its provision relating to duration, would mean that on the expiry of the fixed period a fixed-term contract cannot be relied upon for the purpose of impugning a refusal to renew it. Such an interpretation, moreover, would fail to take into account the nature of renewal as understood in the Staff Regulations to which the contract expressly refers. This is an aspect of the matter which has to be considered in order to determine whether, as has been argued, the holder of a fixed-term contract is, so far as its renewal is concerned, in the same legal position as an applicant for employment seeking to enter the service of Unesco.

" Clearly, an applicant for a new appointment who fails to obtain it cannot properly invoke the jurisdiction of the Administrative Tribunal. Can the same be said of an official who fails to obtain a renewal of his fixed-term contract? The question of the renewal of a fixed-term contract arises for one who is at the time a staff member of Unesco. That was the position of the four complainants. The text governing their appointments was Staff Regulation 4.5.1, which provided as follows:

> ' Other staff members shall be appointed on fixed-term contracts for an initial period of not less than one nor more than three years, renewable either (*a*) without limit of time, or (*b*) in the light of programme requirements, for further fixed periods of not less than one year up to a maximum period of service of five years, at the discretion of the Director-General. Staff members appointed before 1 January 1952 shall be deemed, for the purpose of this regulation, to have been appointed on that date, without prejudice to their acquired rights in other respects.'

The words ' fixed-term contracts . . . renewable ' imply that renewal constitutes a further stage, a continuing period, of the former contract. There is no question here of a new contract wholly unrelated to its predecessor. That character of renewal is confirmed by a distinction between fixed-term contracts, which may be renewed, and temporary contracts in respect of which there is no provision for renewal. Staff Rule 52 (*d*) provided as follows:

> ' A fixed-term appointment shall expire upon completion of the fixed-term unless a new appointment is offered and accepted three months before the expiry date, if the staff member has served for less than one year or six months before the expiry date, if he has served for more than one year.'

" On the other hand, Staff Rule 53 (*d*) said merely:

> ' A temporary appointment shall expire on the expiry date specified in the contract without notice or indemnity.'

" From the use of the expression ' new apointment ' in Rule 52 (*d*), cited above, it cannot be concluded that what is currently called ' renewal ' is an appointment without any link with what precedes it and that the official to whom such renewal has been offered or refused is in the same situation as an applicant who is new to the staff of Unesco and wishes to enter it for the first time. The proper meaning of the expression ' new appointment ' does not lend itself to any such interpretation, and the Administration has not understood it in that sense. In fact, the Director-General introduced in Rule 52 (*d*), which has become Rule 104.6, a modification which entered into force on November 1st, 1954, and which consists in the substitution of the expression ' renewal ' for the expression ' new appointment '. It is the text thus amended which the Administrative Tribunal has cited in the reasons for its decision on competence.

" The view that there is a link between renewal and the original contract and that the situation here envisaged is different from that arising in the case of granting a new contract to an applicant corresponds to the accurate meaning of the term ' renewal '. That view is also in accordance with the fact that at the time when the question of renewal arises the interested person is an official of the Organization and not a stranger to it. This is the reason why Rule 52 (*d*), both in its original version and in the amended text (which became Rule 104.6 (*d*), then Rule 104.6 (*e*)), after having stated that the original appointment expires on the fixed date, adds, by way of exception, the following words: ' unless a new appointment [or renewal] is offered and accepted ' and this ' before the expiry date ' of the original appointment. This confirms the view that in cases of renewal it is the initial appointment which remains in existence and not a new appointment independent of its predecessor.

" Similarly, Staff Rule 61 (which has become Rule 104.14) which is concerned with re-employment, shows that the latter is something different from the renewal of an appointment. The renewal of an appointment is effected differently from the grant of an original appointment. A comparison between paragraphs 13 and 14 of the Personnel Recruitment Standards and Methods makes the position clear. In paragraph 14, the following sentence occurs: ' If a staff member has fulfilled his duties efficiently and his conduct is satisfactory, his appointment is, in most cases, renewed.' The passage quoted suggests that the renewal is something fundamentally different from the granting of a new appointment; at the same time it indicates that a diligent staff member may normally expect renewal. The use of the word ' review ' in the heading of the English text of paragraph 14 confirms the impression that the renewal is based on an examination of the record of service of the official concerned.

" The provision, quoted above, of Staff Regulation 4.5.1, under which a staff member appointed on a fixed-term contract cannot be kept in that status for a period of service of more than five years, similarly implies that it is the original contract which continues in existence up to that maximum period.

" Reference may also be made to the form given by the General Conference at its Eighth Session in 1954 to Staff Regulation 4.2, which thereafter provided as follows:

> ' In appointing, transferring or promoting staff members, *and in renewing appointments*, the Director-General shall aim at securing the highest standards of efficiency, competence and integrity.'

The words in italics were added in 1954. The fact that it was considered desirable to make this addition indicates that the renewal of an appointment was considered as being somewhat different from the act of ' appointing ' referred to in the earlier text. Finally—and this is more than a matter of technical detail—it is of interest to note that the document entitled ' Notice of Personnel Action ', which is attached to the original Letter of Appointment, defines the type of action as ' appointment ' whereas that attached to the second Letter of Appointment defines the type of action as ' extension of contract '—a wording which recalls the notion of an original contract whose duration is simply prolonged.

" All this shows that there is a relationship, a legal relationship, between the renewal and the original appointment and, consequently, between the renewal and the legal position of an official at the moment when his claim to renewal is granted or denied. Does that relationship go so far as to create in his favour, as has been claimed, a definite right to renewal? That is a question which pertains to the merits and which it is not necessary for the Court to answer. It is sufficient to note that the complaint of the appellant was related to the link created between the original contract and its renewal—a link clearly established by the Staff Regulations and Rules to which the contract expressly makes reference and which constitute the legal basis on which the interpretation of the contract must rest. Thus the complainant, in claiming to possess a right to renewal of his contract and in claiming that that right had been infringed, was placing himself on the ground of non-observance of the terms of appointment.

" The legal relationship thus found to exist between a fixed-term contract and its renewal—a relationship which constitutes the legal basis of the complaints of the officials—shows itself once more in the decision taken by the Director-General in the Administrative Memorandum of July 6th, 1954.

" In this Memorandum the Director-General announced that he had ' decided that all professional staff members ' who satisfied certain conditions and whose services were needed would ' be offered one-year renewals of their appointments '. It was possible to maintain that the effect of the Memorandum was to create a right to the renewal of the contracts. The Court considers that it could reasonably be maintained that an administrative notice framed in such general terms might be regarded as binding on the Organization; and that the necessity, asserted by Unesco, of an individual offer and an individual acceptance of the offer was, in the circumstances, a matter of form rather than of substance. It is not necessary for the Court to decide whether the legal consequences thus envisaged actually followed from the Administrative Memorandum. In any case, the Court considers that if the Director-General thought fit to refuse to an official the benefit of the general offer thus extended, any dispute which might arise with regard to the matter fell within the jurisdiction of the Administrative Tribunal.

" It follows from the preceding considerations that the Administrative Tribunal was entitled to assume that the complaints required it to adjudicate on an alleged non-observance of the terms of appointment, and, consequently, to declare itself competent to hear them. In the course of those considerations, the Court referred to the provisions of the Staff Regulations and of the Staff Rules. On this ground, which constitutes a second basis for the jurisdiction of the Administrative Tribunal, the Court feels it necessary to add certain observations which serve to confirm the conclusions already reached.

" Before the Administrative Tribunal, Unesco contended that the complaints of the officials were based ' on a profound . . . misinterpretation of implications of temporary appointments '; that they involved a ‘ revolution in the system of temporary contracts ’; and that Unesco sought ‘ to define . . . the terms “ permanent contract ” and “ temporary appointment ” [. . . and . . .] the different situations to which they correspond and their respective legal consequences ’. It was thus putting itself on the ground of the provisions of the Staff Regulations, that is, on the ground covered by the jurisdiction of the Administrative Tribunal as defined in Article II, paragraph 5, of its Statute. Conversely, in the Duberg case the complainant analysed under three points the arguments of the Director-General: (1) the appellant had no acquired right to the renewal of his contract; (2) the Director-General was not bound to state his reasons for non-renewal; and (3) his decision in the matter was not subject to the control of a jurisdictional body. The complainant contested these propositions. He did so in reliance not only on the terms of the contract, but also of the Staff Regulations.

“ Under Staff Regulations 4.5.1, the renewal of fixed-term contracts was made subject to ‘ programme requirements ’. The Director-General took the view that he could not anticipate what might be decided with regard to this point by the General Conference, which was to meet at the end of 1954. This fact explains why he took no action with regard to the renewal of Duberg’s contract, which was due to expire on December 31st, 1954, before the date fixed for this purpose by Staff Rule 52 (*d*), which subsequently became Rule 104.6 (*d*). In these circumstances, the Director-General, believing ‘ that there is general agreement that the personnel policy of the Organization should be based on the concept of an international civil service and should be aimed at retaining on a permanent basis those staff members who achieve the highest standards of efficiency, competence and integrity and whose services are needed ’, issued, on July 6th, 1954, an Administrative Memorandum on the subject of ‘ Renewal of appointments expiring end 1954 and early 1955 ’. In this Memorandum, the Director-General announced that he had ‘ decided that all professional staff members ’ whose contracts would shortly expire and ‘ who have achieved the required standards of efficiency, competence and integrity and whose services are needed, will be offered one-year renewals of their appointments ’. What was the character of that Memorandum ? In the view of the Court it constituted a modification of the Staff Rules then in force—a modification which the Director-General was authorized to make under Staff Regulation 12.2. By virtue of that modification, Article 52 (*d*) of the Staff Rules was provisionally altered. All officials whose contracts would expire between July 6th, 1954, and June 30th, 1955, and who possessed the required qualifications, were now informed that they would be offered a renewal of one year. The prescribed period of three months or six months had ceased to be relevant. The resulting situation shows that the Administrative Memorandum was related to the application of the Staff Regulations.

" Finally, there are two other facts which bring the Administrative Memorandum of July 6th, 1954, within the terms of Article II, paragraph 5, of the Statute of the Administrative Tribunal. In the first place it referred to the phrase ' in the light of programme requirements ' embodied in Staff Regulation 4.5.1. In the second place, the Memorandum relied by implication on Staff Regulation 4.2, which lays down that in appointing, transferring or promoting staff members, the Director-General shall aim at securing the highest standards of efficiency, competence and integrity. The controversy submitted to the Administrative Tribunal centred around the notion of integrity referred to both in the Memorandum and in Staff Regulation 4.2. Indeed that was the crucial point in reliance on which the complaint challenged the decision of the Director-General as open to attack. From this point of view, the allegation of non-observance of Staff Regulations seems clearly to fall within the jurisdiction of the Tribunal.

" It follows from the preceding considerations that whether looked at from the point of view of non-observance of the terms of appointment or of that of non-observance of Staff Regulations, the question was, as stated by the Administrative Tribunal in the reasons which it gave for its decision in the matter of competence, one of a ' dispute concerning the interpretation and application of the Staff Regulations and Rules of the defendant Organization ' and that, in consequence, the Tribunal was justified in confirming its jurisdiction.

" The Court has not lost sight of the fact that both before the Administrative Tribunal and in the statements submitted to the Court it has been contended, on the one hand, that the Administrative Tribunal was an international tribunal and, on the other hand, that it was a Tribunal of limited jurisdiction (' *juridiction d'attribution* ') and not of general jurisdiction (' *juridiction de droit commun* '). That contention has been put forward with a view to achieving a restrictive interpretation of the provisions governing the jurisdiction of the Tribunal. The Court does not deny that the Administrative Tribunal is an international tribunal. However, the question submitted to the Tribunal was not a dispute between States. It was a controversy between Unesco and one of its officials. The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization.

" The Court recognizes that the Administrative Tribunal is a

Tribunal of limited jurisdiction. Accordingly, the Court has proceeded on the basis of the provision which confers upon the Tribunal jurisdiction in the matter of 'complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations'. The Court has acted upon that provision and upon the other relevant provisions of the Staff Regulations. In doing so the Court has relied on the wording of the texts in question as well as on their spirit, namely, the purpose for which they were adopted. That purpose was to ensure to the Organization the services of a personnel possessing the necessary qualifications of competence and integrity and effectively protected by appropriate guarantees in the matter of observance of the terms of employment and of the provisions of the Staff Regulations. It is in that way that the Court arrived at what it considers to be the correct interpretation of Article II (5) of the Statute of the Administrative Tribunal and the proper application of that provision to the case submitted to it. It was not necessary for it, for that purpose, to have recourse to any principles of either restrictive or extensive interpretation.

" The Court, having decided to give an affirmative answer to Question I, will now examine Question II as put to it in the Request for an Advisory Opinion. That question is as follows:

' II.—In the case of an affirmative answer to question I:

(*a*) Was the Administrative Tribunal competent to determine whether the power of the Director-General not to renew fixed-term appointments has been exercised for the good of the service and in the interest of the Organization ?

(*b*) Was the Administrative Tribunal competent to pronounce on the attitude which the Director-General, under the terms of the Constitution of the United Nations Educational, Scientific and Cultural Organization, ought to maintain in his relations with a Member State, particularly as regards the execution of the policy of the Government authorities of that Member State ? '

" Article XII of the Statute of the Administrative Tribunal provides for a Request for an Advisory Opinion of the Court in two clearly defined cases. The first is where the Executive Board challenges a decision of the Tribunal confirming its jurisdiction; the second is when the Executive Board considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed. The Request for an Advisory Opinion under Article XII is not in the nature of an appeal on the merits of the judgment. It is limited to a challenge of the decision of the Tribunal confirming its jurisdiction or to cases of fundamental fault of procedure. Apart from this, there is no remedy against the decisions of the Administrative Tribunal. A challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision.

" There is no reference in Question II either to a fundamental fault of procedure or to the decision of the Tribunal confirming its jurisdiction. This is so although the two parts of that question are formulated in terms of ' competence '. For these are questions relating to the reasons given by the Tribunal for its decision on the merits of the question submitted to it. The reasons given by the Tribunal for its decision on the merits, after it confirmed its jurisdiction, cannot properly form the basis of a challenge to the jurisdiction of the Tribunal. Question I of the present Request for an Opinion is concerned only with a challenge of the decision confirming jurisdiction. It does not refer to the other ground of challenge provided for in Article XII, namely, a fundamental fault in the procedure followed. The Statute of the Administrative Tribunal could have provided for other reasons for challenging the decision of the Tribunal than those referred to in Article XII. It has not done so. In view of this, the Court cannot answer Question II within the framework of Article XII of the Statute of the Tribunal—the only Article by reference to which the Opinion of the Court is invoked

" Undoubtedly, Unesco has the general power to ask for an Advisory Opinion of the Court on questions within the scope of its activity. But the question put to the Court has not been put in reliance upon the general power of Unesco to ask for an Advisory Opinion. It has been expressly linked with Article XII. In its terms and by virtue of the place which it occupies in the Resolution requesting the Advisory Opinion, Question II as put to the Court refers to the judgments which the Executive Board has challenged in relation to the jurisdiction of the Tribunal which rendered these judgments. It is on that basis that the question must be considered by the Court. The Court has found that the object of that Question is outside the matter which, in the judgments which have been challenged, is germane to the jurisdiction of the Tribunal. In the Request for an Advisory Opinion, Question II has been placed within the orbit of Article XII. Actually, it is outside that Article. Accordingly, it cannot be considered by the Court for the purpose of acting upon the request made to it.

" As, for the reasons stated, the Court is not in the position to answer Question II, it need not be concerned with some of the wider issues argued at length before the Tribunal and in the written statements submitted to the Court. These issues include that of the law obtaining in various municipal systems as to the position of the employees of the State, the nature of their employment and the principles of judicial review governing the tenure and the conditions of their service. These questions do not arise in the present case.

" Similarly, the Court need not consider the allegation that the

Tribunal, which was competent to hear the complaint, committed an excess of jurisdiction and acted *ultra vires* in the decision which it gave. Article XII of the Statute of the Tribunal only refers to a challenge of ' a decision of the Tribunal confirming its jurisdiction '. A Request for an Advisory Opinion based on that Article cannot, contrary to the contention of Unesco, extend to an allegation that the Tribunal ' went beyond the bounds of its competence in its consideration of the disputes '. Any such allegation, even if it were well-founded, could not lead to the conclusion that the Tribunal was not competent to hear the complaint.

" In view of this the Court need not examine the allegation that the validity of the judgments of the Tribunal is vitiated by excess of jurisdiction on the ground that it awarded compensation *ex aequo et bono.* It will confine itself to stating that, in the reasons given by the Tribunal in support of its decision on the merits, the Tribunal said: ' That redress will be ensured *ex aequo et bono* by the granting to the complainant of the sum set forth below.' It does not appear from the context of the judgment that the Tribunal thereby intended to depart from principles of law. The apparent intention was to say that, as the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the Tribunal fixed what the Court, in other circumstances, has described as the true measure of compensation and the reasonable figure of such compensation (*Corfu Channel case*, Judgment of December 15th, 1949, I.C.J. *Reports* 1949, p. 249[1]).

" Question III submitted to the Court is as follows:

> ' III.—In any case, what is the validity of the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21 ? '

Under Article VI of the Statute of the Administrative Tribunal, its judgments ' shall be final and without appeal '. However, Article XII authorizes the Executive Board to challenge those judgments, but only on the ground of lack of jurisdiction or of fundamental fault in the procedure followed. In case of such a challenge, it is for the Court to pass, by means of an Opinion having binding force, upon the challenge thus raised and, consequently, upon the validity of the judgment challenged. The four judgments have been challenged only in respect of the competence of the Administrative Tribunal which rendered them. If the Court had upheld this challenge it would have had to declare the judgments invalid. The Court, having rejected the contention relating to jurisdiction, the only contention raised by the Executive Board, will consequently answer Question III by a finding in favour of the validity of the four judgments."

[Report: *I.C.J. Reports*, 1956, p. 77.]

[[1] See *Annual Digest*, 1949, Case No. 117.]

Judge Kojevnikov made the following declaration:

" Whilst voting in favour of the decision of the Court to comply with the Request for an Advisory Opinion submitted by Unesco, and of the final part of the Opinion itself with regard to Questions I and III, put by Unesco on November 25th, 1955—although I do not agree with certain aspects and data relating to the reasoning of that decision and of that Opinion—I am nevertheless unable to concur in the view of the Court on Question II.

" In my opinion, the Court, having recognized the competence of the Administrative Tribunal, the validity and consequently the binding force of the Judgments given by it, it ought also to have dealt with Question II and given it an affirmative answer.

" Indeed, the Administrative Tribunal had to decide whether the action of the Director-General was dictated by the interests of Unesco and whether his attitude corresponded to the provisions of the statute of that Organization.

" Without a solution to those questions, the Administrative Tribunal was not in a position to give a decision on the merits of the case and to find that the dismissal of the officials concerned was due solely to their refusal to appear before the Loyalty Board of the United States.

" Accordingly, the Administrative Tribunal was competent to hear the complaints introduced against Unesco by the officials concerned and the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21 are perfectly well-founded, valid and binding upon Unesco and effect must be given to them by the Organization."

Judge Winiarski delivered the following Separate Opinion:

" The advisory function of the Permanent Court of International Justice, introduced by Article 14 of the Covenant of the League of Nations, gave rise to serious doubts and grave concern on the part of the Permanent Court at the beginning of its activities, as it had on the part of jurists when the Covenant was being drafted and later when the Statute of the Court was being prepared in 1920. At the preliminary session of the Court in 1922 which was devoted to drawing up the first Rules of Court, Judge J. B. Moore began his important report on the subject in the following terms: ' No subject connected with the organisation of the Permanent Court of International Justice has caused so much confusion and proved to be so baffling as the question whether and under what conditions the Court shall undertake to give " advisory " opinions.'

" The important problem which the Court had to resolve was to reconcile its advisory function and its character as a Court of Justice, as an independent judicial organ of international law. On the one hand there were the Opinions, without binding force, which ought to impose themselves by virtue of the great authority attaching to them; otherwise, as Judge Moore pointed out in his report, the prestige of the Court might be discredited. On the other hand, Article 14 provided: ' The Court may also give (in French: *donnera*) an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly ', which appeared to indicate that there was a possibility of introducing the compulsory jurisdiction by the circuitous means of advisory opinions: by giving an opinion on a legal question relating to an existing dispute between States, the Court would in substance be adjudicating on the dispute itself although the parties had not accepted its jurisdiction for that purpose.

" The Permanent Court met this twofold danger in two ways. First, it provided the exercise of its advisory function with judicial forms and safeguards; secondly, it recognized that it might decline to give an opinion if there were compelling reasons against its doing so, in accordance with the conclusion reached in the Moore report to the effect that if an application for an advisory opinion should be presented, ' the Court should then deal with the application according to what should be found to be the nature and the merits of the case '. In 1923, in the famous Opinion concerning the Status of Eastern Carelia, the Court laid down the principles which led it to decline to give the opinion requested by the Council; these principles were summarized in the following well-known sentence: ' The Court, being a Court of Justice, cannot, even in giving Advisory Opinions, depart from the essential rules guiding it as a Court.' (Opinion No. 5, p. 29.) In 1935, President Anzilotti, recalling the constant attitude of the Permanent Court, added the following idea which has lost none of its force: ' It is . . . difficult to see how the Court's independence of the political organs of the League of Nations could be safeguarded, if it were in the power of the Assembly or the Council to oblige the Court to answer any question which they might see fit to submit to it ' (A/B 65, p. 61).

" The attitude of the International Court of Justice does not differ from that of the Permanent Court. In its Opinion of March 30th, 1950, after noting that the Court's Opinion in principle should not be refused, the Court stated: ' There are certain limits, however, to the Court's duty to reply to a Request for an Opinion. It is not merely an " organ of the United Nations ", it is essentially the " principal judicial organ " of the Organization (Art. 92 of the Charter and Art. 1 of the Statute).' And further on: ' Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request ' (pp. 71–72). On another occasion, recalling the principles thus stated, the Court said: ' The permissive provision of Article 65 of the Statute recognizes that the Court has the power to decide whether the circumstances of a particular case are such as to lead the Court to decline to reply to the request for an Opinion ' (Reports 1951, p. 19). The Court has not considered that the circumstances of the case now before it are such as to lead it to decline to give an answer and it is on this point that I regret I am unable to agree with the decision of the Court.

" I pointed out above that from the beginning the Permanent Court provided the exercise of its advisory function with judicial forms and safeguards. In connexion with the first revision of the Rules (1926–1927) the Committee appointed by the Permanent Court and composed of Judges Loder, Moore and Anzilotti, made the following statement in its report: ' The Court, in the exercise of this power, deliberately and advisedly assimilated its advisory procedure to its contentious procedure; and the results have abundantly justified its action. Such prestige as the Court to-day enjoys as a judicial tribunal is largely due to the amount of its advisory business and the judicial way in which it has dealt with such business. In reality, where there are in fact contending parties, the difference between contentious cases and advisory cases is only nominal.' (Fourth Annual Report, 1927–1928, p. 76.)

" At the 1929 Conference for the revision of the Statute of the Permanent Court, the following explanation was given with regard to Article 68 which had been revised and was subsequently transmitted to the Assembly: ' It would be quite useless to give an advisory opinion after hearing only one side. For the opinion to be useful, both parties must be heard. It was therefore quite natural to lay down in the Statute of the Court that, in regard to advisory opinions, the Court should proceed in all respects in the same way as in contentious cases.'

" The revised Statute of 1929 and the revised Rules of 1936 were the last stages in the evolution which necessarily led to considerable assimilation of the two procedures, an assimilation which was almost complete in so far as ' existing ' disputes between two or more States was concerned.

" The position of the International Court of Justice with regard to the advisory function has remained practically the same, and although Article 65 of the Statute, in accordance with Article 96 of the Charter, has abandoned the difference between ' a question ' and ' a dispute ' in favour of a reference to ' any legal question ', Article 68 of the Statute has remained unchanged and Article 82 (modified) of the Rules continues to provide: ' . . . it [the Court] shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States ' in order to be guided by the provisions of the Statute and Rules which apply in contentious cases to the extent to which it recognizes them to be applicable.

" In conducting its advisory activity in this way, the Court respects the principle of the independence of States by virtue of which disputes between States may not be settled without their consent, even indirectly, by means of an advisory opinion; the Court also respects two fundamental principles from which, as a judicial body, it cannot depart: *audiatur et altera pars* and the equality of the parties before a Court. The strict observance of these principles and the constant will of the Court to be fully enlightened in its study of the questions referred to it were to invest the Opinions of the Court with the necessary authority.

" The case now before the Court falls within neither of the two categories of questions in respect of which the advisory function of the Court has been provided: it is neither an abstract question nor a ' question actually pending between two or more States '. The Court, whose duty it is to ascertain the reality of the relations which are at the basis of the question to be answered by it, has not failed to note that it is confronted by the final stage in the proceedings between Unesco and its former officials. Having been regularly seised by an Organization duly authorized to do so by the General Assembly, and having been seised of a legal question arising within the field of the Organization's activities, the Court is competent to give an answer to that question; however, as is noted in the Opinion, the procedure thus brought into being ' appears as serving, in a way, the object of a judicial appeal ' against the four judgments of the Administrative Tribunal, and this utilization of the advisory procedure was certainly not contemplated by the draftsmen of the Charter and of the Statute of the Court.

" Of course what is involved is not a regular appeal. Such appeals were contemplated by the delegation of Venezuela at the San Francisco Conference and would have necessitated an appropriate modification of Article 34 of the Statute which was formulated by that delegation in the following terms: ' As a Court of Appeal, the Court will have jurisdiction to take cognizance over such cases as are tried under original jurisdiction by international administrative tribunals dependent upon the United Nations when the appeal would be provided in the Statute of such tribunals.' This proposal was defeated. (Doc. 284, IV/1/24.)

" It is conceivable that a question relating to the validity of a judgment of the Administrative Tribunal should be referred to the Court in an isolated manner, within the framework of its normal advisory activity and in accordance with the rules and principles governing that activity; but even in that case the problem would present grave difficulties. In the case now before the Court the character of a final settlement by means of appeal against the four judgments follows from the fact that the Request for an Advisory Opinion has been made in accordance with Article XII of the Statute of the Administrative Tribunal; the binding character of the Opinion does not in itself affect the competence of the Court but constitutes further proof that what is involved is an appeal in the form of a Request for an Advisory Opinion.

" As regards the procedure, Unesco, in approaching the Court, was guided by the special provisions laid down by the Council of the League of Nations in the case of the former officials of the Saar, which had moreover never been applied; it was also guided by the Resolution which was recently adopted by the General Assembly with a view to amending the Statute of the Administrative Tribunal of the United Nations. The Director-General, who was

' anxious to ensure the fullest possible equality of rights to those concerned ', stated that he was prepared to transmit their views to the Court (statement by the Legal Adviser, read at the meeting of the Executive Board held on November 25th, 1955, Doc. 42 Ex/SR/1–27). This procedure, to which the Court did not object, has led to a situation in which one of the parties to the proceedings before the Administrative Tribunal can only send its observations to the Court through the intermediary of the other party.

" As regards the oral proceedings, Unesco has expressed its intention of refraining from presenting an oral statement for the same reasons. The afore-mentioned statement by the Legal Adviser, however, added the following words: ' It should, furthermore, be noted that in order to fulfil its purpose—which is to ensure the fullest possible equality of rights—abstention from the presentation of oral statements must be total and must apply not only to the organization concerned, but also to the other international organizations and to Member States.' In this way, since the officials concerned were unable to appear before the Court, the States, Organizations and even the Court had to dispense with the oral argument which is the rule in advisory proceedings.

" The fact that this unusual procedure has not given rise to any objection on the part of those concerned and that it has been consented to by counsel for the officials is irrelevant. These officials had no place in the normal advisory procedure. The important thing is that the oral proceedings, which constitute the means by which the Court usually obtains clarification of the issue before it, have been dispensed with beforehand.

" Unesco alone may apply to the Court to challenge the judgments of the Administrative Tribunal. It was legally impossible to confer the same right on the officials. They won their case before the Tribunal; had they lost it, no remedy would have been available to them. This inequality in itself may not constitute a bar to the Court's giving an Opinion in this case; it does however add to the situation in which the Court finds itself, a situation which is not compatible with its judicial character. Furthermore, any attempt to reduce, if not eliminate, these inequalities between the Organization and the individuals further emphasizes the contradictions between this hybrid procedure and the Statute of the Court, for in the final analysis this procedure runs counter to the fundamental provisions of Article 34 to the effect that ' Only States may be parties in cases before the Court ' and to the provisions of Articles 65 and 66 by virtue of which only States and international organizations may participate in advisory proceedings.

" For these reasons, it is my view that the Court would follow a safer course by refraining from complying with the Request for an Opinion. Since the Court has decided otherwise, I concur in the answers given by the Court although I do not agree with all the reasoning of the Opinion."

Judge Klaestad delivered the following Separate Opinion:

" In my view, the Court should not have given the requested Opinion for the following reasons:

" I. This Request for an Advisory Opinion, which is presented under Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation, relates to four judgments rendered by that Tribunal in contentious cases brought before the Tribunal against Unesco by four of its former officials. Unesco challenges the validity of the judgments, by means of a Request for an Advisory Opinion, on the alleged ground that the Tribunal lacked jurisdiction or has exceeded its jurisdiction.

" The normal judicial method of challenging judgments rendered by the Administrative Tribunal in contentious cases between an international organization and individuals would be by means of a review in contentious procedure. As, however, Article 34 of the Statute of this Court allows neither international organizations nor individuals, but only States, to appear before the Court as parties to contentious cases, the possibility of such a review by this Court would be excluded. In such circumstances Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation is intended to provide another means of submitting to this Court the question of the validity of judgments rendered by that Administrative Tribunal, namely, by way of a Request for an Advisory Opinion on questions relating either to the jurisdiction of the Tribunal or to ' a fundamental fault in the procedure followed '.

" The four cases to which the Questions put to the Court relate, and which by their very nature were contentious cases before the Administrative Tribunal, have thus, by the operation of Article XII of the Statute of that Tribunal, been transformed into cases of an advisory character before this Court, though with the modification of the usual advisory procedure that the opinion given by the Court by virtue of Article XII, paragraph 2, shall be binding. This transformation from a contentious procedure before the Administrative Tribunal into an advisory procedure before this Court entails procedural consequences of a serious nature.

" It follows from the provisions of Article 66 of the Statute of the Court that only States and international organizations have access to the Court in advisory cases. Individuals have no right to participate in the proceedings before the Court. In accordance with that Article, the Court may receive written or oral statements only from States or international organizations. Individuals have not been accorded any right to submit written statements to the Court or to appear or be represented at public sittings in order to submit oral statements relating to the Questions put to the Court for an Advisory Opinion. Though the four former officials of Unesco are directly interested in the matter now before the Court and will be directly affected by its Opinion, they have not, by the provisions of Article 66, been given an opportunity to defend their interests. Nevertheless, Article XII, paragraph 2, of the Statute of the Administrative Tribunal provides that the opinion given by the Court shall be binding.

" With a view to providing a remedy for this obviously unacceptable situation, Unesco has suggested that the observations and information which the four former officials may wish to lay before the Court should be transmitted to the Organization which, without any check of their contents, thereafter will send these observations and this information to the Court within the fixed time-limits. This suggestion has been accepted and complied with by Counsel for the four former officials. An expedient of this kind does not, however, ensure the necessary equality of status, in fact and in law, between the Organization on the one side and the individuals concerned on the other, inasmuch as the individuals would have to be dependent on the Organization—their opponent in the disputes before the Administrative Tribunal —for the presentation of their views to the Court.

" The question of oral hearings presents even more serious difficulties. As Article 66 of the Statute does not allow individuals to appear or be represented at oral hearings, the Court would, if it fixed such hearings, have to envisage the possibility of Unesco appearing at the hearings and defending its view in the absence of the four former officials or their representative who are not entitled to participate. In order to prevent such an eventuality and to ensure, as far as possible, the necessary equality between the Organization and the individuals concerned, the Court was compelled to dispense with oral hearings in the present advisory case, though Article 66 presumes that oral hearings may be fixed by the Court, and in spite of the fact that such hearings have hitherto been fixed in all advisory cases which have been considered by this Court, as being a normal and useful, if not an indispensable, part of its proceedings.

" II. Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation, under which the Request is presented, provides that in any case in which the Executive Board of an international organization, which has made the declaration specified in Article II, paragraph 5, challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision shall be submitted by the Executive Board concerned, for an Advisory Opinion, to this Court. Though the decisions of the Administrative Tribunal are rendered in disputes between the international organization and individuals, only the organization is accorded the right to challenge the validity of the decisions in this manner. The other parties to the disputes, the individuals, have no corresponding right to challenge the validity of the decisions. The reason for this manifest inequality may partly be due to the Statute of this Court, which does not entitle individuals to present a request for an Advisory Opinion.

" The provisions of Article XII have thus established a manifest inequality between the parties to a dispute decided by the Administrative Tribunal. The Article has introduced a review procedure which fails to observe fundamental principles of equality of justice and impartiality of procedure. This lack of equality and impartiality is aggravated by the fact that the right to challenge the validity of a decision rendered by the Administrative Tribunal, while granted to the international organization, is denied to the weaker party.

" III. In view of the abnormal judicial situation thus created by these various procedural rules, it may be asked whether the Court ought to answer the Questions put to it.

" Article 65 of the Statute provides that the Court '*may give*' (in the French text: '*peut donner*') an advisory opinion on any legal question. Accordingly, in its Advisory Opinion of 1950 concerning the *Interpretation of certain Peace Treaties* (first phase),[1] the Court stated:

> " ' Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request.'

In the advisory case concerning the *Status of Eastern Carelia*,[2] the Permanent Court of International Justice in 1923 actually declined to give an Opinion. The Permanent Court had previously, in March 1922, discussed the question whether it had the right to refuse to give a requested Advisory Opinion. Judge Moore had presented a memorandum in which he expressed the view that Article 14 of the Covenant of the League of Nations could not be regarded as imposing on the Court an obligation to render Advisory Opinions unconditionally and on request. The Court concurred in that view (Publications of the Court, Series D, No. 2, pages 161 and 383–398).

" At that time the rule relating to advisory opinions was inserted in the Covenant of the League of Nations, Article 14. The English text provided: ' The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.' In the French text it was said: ' Elle [la Cour] donnera aussi des avis consultatifs sur tout différend ou tout point, dont la saisira le Conseil ou l'Assemblée.' The Statute of the International Court of Justice changed in Article 65 the word '*donnera*' to '*peut donner*', thereby giving also in the French text a clear expression of the permissive character of the provision.

" The Court is therefore, in my view, entitled to decline to give a requested Advisory Opinion when it finds that decisive reasons lead it to do so.

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[1] See *International Law Reports*, 1950, Case No. 105 (p. 335).]

[2] See *Annual Digest*, 1923–1924, Case No. 219.]

" IV. Having regard to these various considerations, I am inclined to think that the Court should not, by answering the Questions put to it, implicitly give its sanction to a review procedure which places the parties to the disputes to which the Questions relate on a footing of manifest inequality, and which, contrary to the provisions of Article 66 of the Statute, creates an obstacle to the Court's consideration at oral hearings of requests for an Opinion. These considerations appear to be particularly relevant in the present advisory case in view of Article XII, paragraph 2, of the Statute of the Administrative Tribunal, which provides that the Opinion given by the Court shall be binding, thus assimilating the present advisory case more closely than usual to a contentious case.

" To give an Advisory Opinion in the present case on the basis of this defective review procedure would hardly be compatible with the judicial duties of the Court. Being desirous to co-operate, as far as possible, with another organ of the United Nations in the discharge of international duties, the Court has departed from its usual procedure by dispensing with oral hearings and by receiving from the individuals concerned, who have no access to the Court, written statements transmitted to the Court by the Organization. Whatever may be thought of such a departure from a normal judicial procedure, the Court cannot in any case disregard or compromise with the fundamental principle of the equality of parties—equality in law as well as in fact—a principle which is expressly confirmed by Article 35, paragraph 2, of the Statute of the Court. Nor should the Court, by answering the Questions put to it, appear to acquiesce in a review procedure which fails to observe generally recognized principles by according only to one of the parties to the judgments of the Administrative Tribunal the right to challenge these judgments.

" For these reasons, I consider that the Court should have availed itself of its right under Article 65 of the Statute to refrain from giving the requested Opinion.

" On the other hand, I do not go so far as to say that the Court lacks jurisdiction to give an Advisory Opinion in the present case. Inasmuch as the Opinion, in accordance with Article 96 of the Charter of the United Nations and Article 65 of the Statute of the Court, is requested by a duly authorized organ of the United Nations on legal questions arising within the scope of its activities, and since Questions I and III—but hardly Questions II (*a*) and (*b*)—fall within the terms and scope of Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation, the jurisdiction of the Court to give an Opinion appears to be established. But in my view the Court should have refrained from exercising its jurisdiction, as it did, for different reasons, in the *Monetary Gold Case.*[1] Since, however, the Court has decided otherwise, I have voted with regard to the Questions put to it, accepting the Answers given in the Operative Part of the Opinion."

Judge Zafrulla Khan delivered the following Separate Opinion:

" I am in general agreement with the reasoning of those of my colleagues who hold the view that the Court should not deliver an Opinion in this case. I desire, however, to set down briefly the principal consideration which in my view should have prevented the Court from proceeding to deliver an Opinion.

" The Court is a judicial body and in the exercise even of its advisory jurisdiction it must fulfil the requirements of its judicial character.

" The judicial character of the function which the Court is called upon to perform requires, *inter alia*, that both sides directly affected by the proceedings before the Court should occupy a position of equality in all respects, including the submission of their views and their arguments to the Court.

[[1] See *International Law Reports*, 1954, p. 399.]

" In the present case, under the Statute and the Rules of the Court, Unesco is entitled to submit its views in writing and to make oral submissions to the Court. The officials concerned are debarred from doing so.

" This difficulty has been sought to be met by the adoption of a procedure under which the observations of the officials were made available to the Court through the intermediary of Unesco and by dispensing with oral proceedings. Both these courses are open to serious objection and, in any event, even their adoption did not put the parties in a position of complete equality.

" It is true that no objection was raised on behalf of the officials concerned to the adoption of this procedure. This does not, however, absolve the Court from its responsibility of ensuring that parties directly affected by the result of the proceedings before the Court should be placed in a position of complete equality. A procedure under which one of the parties vitally concerned in the result of the proceedings can submit its views to the Court only by favour of and through its opponent can scarcely be described as judicial. In my opinion the Court should not countenance the adoption of such a procedure.

" By dispensing with oral proceedings the Court deprived itself of a means of obtaining valuable assistance in the discharge of one of its judicial functions. Oral proceedings were dispensed with not because the Court considered that it could not receive any assistance through that means, but because the inequality of the parties in respect of oral hearings could not be remedied in any manner.

" Even though the Court intimated that it had decided to dispense with oral hearings, it was open to any of the States or international organizations entitled to appear before the Court, under paragraph 2 of Article 66 of the Statute, to request the Court for an oral hearing. If such a request had been received, the Court would have been confronted with a dilemma. It would have found it difficult to refuse the request. To grant it would have meant that the Court would thereby have disabled itself from delivering an Opinion. The Court finds itself able to deliver an Opinion in this case because no request for an oral hearing has been received. This means that in cases like the present, a single State or international organization to whom notice is sent under paragraph 2 of Article 66 can exercise a veto upon the Court's authority to deliver an Opinion. In my humble view, the Court should not comply with a request for an Advisory Opinion in a case which necessitates its having recourse to such procedures and devices."

President Hackworth delivered the following Dissenting Opinion:

" I concur in the conclusion of the Court that it is competent to give an Advisory Opinion in response to the request from the United Nations Educational, Scientific and Cultural Organization, and that it should do so.

" I regret that I am unable to concur in the Opinion which has been given in response to the questions presented by the Organization. On these questions I am in agreement with the conclusions reached by the Vice-President, Judge Badawi, and Judge Read. My reasons, in summary form, are as follows:

" The request for an Opinion relates to judgments given by the Administrative Tribunal of the International Labour Organisation against the United Nations Educational, Scientific and Cultural Organization in favour of four of its former officials—Messrs. Duberg and Leff and Mrs. Wilcox and Mrs. Bernstein—who had been serving under fixed-term appointments which had expired, and which the Director-General of the Organization had declined to renew.

" The request for an Opinion is presented in the form of three questions:

" The first of these questions is whether the Tribunal was competent, under Article II of its Statute, to hear the complaints of these former officials.

" The second question, which is divided into two parts, and which is to be answered only in the event of an affirmative answer to the first question, inquires (*a*) whether the Tribunal was competent to determine whether the power of the Director-General not to renew fixed-term appointments had been exercised for the good of the service and in the interest of the Organization, and (*b*) whether the Tribunal was competent to pronounce on the attitude which the Director-General, under the terms of the Constitution of the Organization, ought to maintain in his relations with a Member State, particularly as regards the execution of the policy of the Government authorities of that Member State.

" The third question inquires concerning the validity of the decisions given by the Tribunal in its judgments in behalf of these four officials.

" In considering the first of these questions, namely, that relating to the competence of the Tribunal to hear the complaints, it is necessary to look to the Statute of the Tribunal by which its jurisdiction is defined.

" From Article II, paragraph 5, of the Statute, we find that the Tribunal is competent to hear complaints in two classes of cases. One of these relates to ' non-observance, in substance or in form, of the terms of appointment of officials ', and the other relates to the ' non-observance of provisions of the Staff Regulations '.

" The Tribunal is not clothed with plenary jurisdiction. Its jurisdiction is wholly statutory and of a limited character. It is not authorized to hear and to pass upon any and every kind of controversy that may arise in connection with the administration of the Organization. On the contrary, its competence, as just stated, is limited by paragraph 5 of Article II of its Statute to the two categories of complaints there mentioned. Being a Tribunal of specifically delegated and limited jurisdiction it follows that it must keep within the orbit of that jurisdiction. Our first task, therefore, is to determine whether the complaints here in question fall within the compass of either of the two categories of complaints to which the competence of the Tribunal extends.

" It is not necessary here to consider the various forms of contracts in use by Unesco for engaging members of its staff, such as those relating to temporary appointments, indeterminate appointments, etc., all of which are governed by special rules. It is sufficient for our purposes to examine only those contracts under which the four officials here in question were serving. These contracts are described in the Staff Regulations of Unesco as fixed-term contracts. Appointments under such contracts are to run for a definite period of time at the end of which period, unless renewed, they automatically terminate.

" This is very clearly stated by Staff Rule 104.6 (*d*) which reads:

> ' A fixed-term appointment shall expire, without notice or indemnity, upon completion of the fixed term unless a renewal is offered and accepted three months before the expiry date in the case of an initial fixed-term appointment of one year, and six months before the expiry date in other cases.'

" It will be noted that such fixed-term appointments expire, ' without notice or indemnity ',[1] upon completion of the fixed term unless a renewal is offered and accepted six months (in these cases) before the expiry date. The appointments of these four officials were not renewed. The gravamen of the complaints is that they should have been renewed and that by reason of this failure to renew the complainants became the victims of unwarranted discrimination.

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[1] These words were added to the old text, and that text as thus amended entered into force November 1, 1954. The text as amended was quoted by the Tribunal in its decision on competence.

" The Staff Rules and Regulations are made an integral part of contracts of employment. Staff Rule 104.3 provides that:

" (*a*) A candidate selected for appointment shall receive a Letter of Appointment signed by the Director-General or his authorized representative, specifying the terms of the appointment.

(*b*) There shall be annexed to the Letter of Appointment a copy of the Staff Regulations and Staff Rules, and a copy of the Declaration of Office.

(*c*) In accepting an appointment, the candidate shall declare in writing that he has taken cognizance of the Staff Regulations and Staff Rules and that he accepts their conditions.

(*d*) The Letter of Appointment with its annexes and the Letter of Acceptance, with the Declaration of Office, duly signed, shall constitute his contract of employment.'

" Had the contracts of appointment in these cases been terminated by the Director-General prior to the expiration of the period for which they were to run, another Rule—Rule 104.6, paragraph (*b*)—concerning reasons for the action taken, notice, and indemnity, would have been applicable, and there might have been grounds for complaint by the employees of which the Tribunal would have had jurisdiction. But we are not here concerned with a situation of that character. Such questions could not arise in these cases. The contracts of appointment were not terminated before their completion. They ran their full term. They were not terminated by the Director-General. They terminated automatically by virtue of their own terms and the applicable Staff Rule, *supra*. All that the Director-General did was to notify the officials, well in advance of the terminal dates, that on the expiration of the fixed-term appointments he would not be able, for reasons stated by him, to offer them further appointments. Requests by the complainants that the Director-General should reconsider his decision were denied.

" Following certain preliminary measures which need not here be related, the complainants filed petitions with the Administrative Tribunal. They did not allege non-observance of the terms of their appointments. Taking the complaint of Peter Duberg as an example (all the complaints followed the same general pattern), we find that the complainant, after a preliminary recitation of facts and allegations, was content to request the Tribunal to rescind the decision of the Director-General and to enjoin him to renew the contract and to pay the petitioner the sum of one franc in respect of damages and legal costs.

" In affirming its competence to hear the case, the Tribunal did not base its action on the ' non-observance ' of the terms of appointment. It impliedly admitted that there was no subsisting contract of appointment for it ordered the Director-General to rescind his decision not to offer a new appointment, and in the alternative to pay an indemnity.

" Conclusions with respect to the second basis of jurisdiction under Article II, paragraph 5, of the Statute, namely, ' non-observance of provisions of the Staff Regulations ', are equally vague.

" The Tribunal did not say that a complaint of this character was before it. What it said was that the question before it was ' a dispute concerning the interpretation and application of the Staff Regulations and Rules of the defendant Organization '.

" It is not clear whether this somewhat imprecise statement as to the nature of the dispute was regarded by the Tribunal as tantamount to a complaint alleging ' non-observance of provisions of the Staff Regulations '. It is not difficult to imagine that many situations might arise in an Organization such as Unesco in which divergent views would develop regarding the interpretation and application of Regulations and Rules. But it does not follow that such differences may form the basis of a complaint falling within the competence of the Administrative Tribunal.

" In order to engage the competence of the Tribunal it must be shown not only that there is a dispute but that the rights of the complainant have been impinged through non-observance of the Regulations or Rules.

" Now what rights of the complainant were violated by action of the Director-General in this case?

" We find that the so-called dispute, as it developed, revolved around two documents: One was an Administrative Memorandum dated July 6, 1954, from the head of the Bureau of Personnel and Management, acting under the direction of the Director-General, concerning the renewal of appointments of staff officials expiring at the end of 1954 and in early 1955. The other was a letter from the Director-General to Mr. Duberg stating that he would not offer him a further appointment.

" The Administrative Memorandum mentioned referred to Staff Regulation 4.5.1 providing that renewals of fixed-term contracts should be, ' (*a*) without limit of time, or (*b*) in the light of programme requirements, for further fixed periods of not less than one year up to a maximum period of service of five years, at the discretion of the Director-General '.

" The Memorandum reveals that the principles to be applied to the renewal or non-renewal of fixed-term appointments due to expire during the then current year and in the first few months of the succeeding year had been a subject of discussion within the Organization; that views had been expressed by the Advisory Council on Personnel Policies, by the Directors of Departments, and by the Staff Council. The Director-General thought that there was general agreement on personnel policy but he was troubled regarding the interpretation to be given to the phrase, ' in the light of programme requirements '. He said that the General Conference in approving Regulation 4.5.1 had given no interpretation of it and that various interpretations had been proposed. He decided that the matter was of such importance that he must consult the General Conference at its forthcoming eighth session on the concept of ' programme requirements '. He added that pending action by the Conference ' all professional staff members whose contracts expire between now and 30 June 1955 (inclusive) and who have achieved the required standards of efficiency, competence and integrity and whose services are needed, will be offered one-year renewals of their appointments '. All such appointments, he said, would be reviewed by him before April 30, 1955, in the light of the decisions and instructions of the General Conference.

" This Memorandum was no more than the announcement of an interim measure with respect to personnel. It obviously was designed to allay the apprehensions of those members of the Staff whose appointments were due to expire within a short time, and to bridge a gap with which the Director-General felt that he was confronted in giving effect to a regulation which he considered required clarification by the General Conference.

" At the time the Memorandum was issued the period within which the fixed-term contracts in three of the cases here in question might have been renewed under Staff Rule 104.6 (*d*), *supra*, had already expired.

" The statement in the Memorandum that one-year renewals would be offered was a qualified one. It was subject to the required standards of efficiency, competence, integrity, and the needs of the service. It did not constitute an offer of renewals. It merely announced a purpose to extend offers. Such offers were to be left to the future and were not to be extended *ipso facto* and in any and all events. They depended upon the satisfying by the employee of the four considerations mentioned in the Memorandum. There was no change in the procedure required by the Staff Rules and Regulations for entering into new contracts of employment, namely, an offer and acceptance. Nor could the statement be deemed to constitute a new Staff Rule. It was nothing more than an *ex parte* statement of policy of a temporary character which the Director-General intended to pursue pending further enlightment on the course which he should follow. But even if it be denominated a new Rule, the legal situation would not be changed. It was yet a qualified statement. It may well have created in the minds of members of the staff, as stated by the Tribunal, a legitimate expectancy that they would be continued in the service, but there was no resulting vested right. Expectations and rights are not synonymous terms. The statement placed the Director-General under no legal obligation *vis-à-vis* members of the staff to offer new appointments, nor did it give the officials a legal right to demand such appointments.

" When, therefore, the Director-General informed the four officials by letters that it was ' with a deep sense of my responsibilities that I have come to the conclusion that I cannot accept your conduct as being consistent with the high standards of integrity which are required of those employed by the Organization ', he was acting within the compass of the Administrative Memorandum and of his prerogatives, as the Chief Administrative Officer of the Organization. Both the Constitution and the Regulations of Unesco feature throughout the importance of a high degree of integrity in the selection and maintenance of the staff. The Director-General was charged with the duty of effectuating this purpose. In declining to renew the appointments, he was exercising a discretionary power given him by the Constitution and by the Staff Regulations. It was for him to determine whether the action of the individuals was incompatible with the high standards required of them, and it was for him to determine whether their actions were capable of harming the interests of the Organization.

" In the absence of evidence that the Director-General had acted in bad faith, i.e. that his action was arbitrary or capricious, it was not for the Tribunal to say that the reasons assigned by him were not justified. It was not for the Tribunal to substitute its judgment in this administrative field for that of the Director-General. He, acting under the authority of the Executive Board and of the General Conference, and not the Tribunal, was charged with responsibility. There was no obligation to renew the appointments. He could have allowed the contracts to lapse without assigning reasons or he could have told these officials that their terms of employment would not be renewed without stating reasons. He stated reasons because he was asked to do so. The fact that he did state them did not invest the officials with a right which they previously did not have. By the same token his statement of reasons did not invest the Tribunal with jurisdiction which it previously lacked. That jurisdiction, as already stated, was confined to two classes of cases, i.e. (1) non-observance of terms of appointment and (2) non-observance of provisions of the Staff Regulations.

" The terms of appointment were not interfered with by the Director-General. They expired automatically, hence jurisdiction could not attach on the first named ground.

" The Regulations did not require renewal of the appointments and the Director-General violated no regulation in declining to offer new appointments. In consequence jurisdiction did not arise on the second ground. The fact that appointments of other officials holding fixed-term contracts were renewed, and that under the general practice of Unesco renewals were ordinarily to be expected by worthy officials, did not alter the legal situation—there was no resulting legal right to renewals.

" My conclusion is that on the first question presented by Unesco on which the opinion of the Court is requested—' Was the Tribunal competent, under Article II of its Statute, to hear the complaints . . .'—must be answered in the negative.

" Having thus answered the first question it becomes unnecessary to consider the second question.

" The third question presented by the Organization relates to the validity of the decisions given by the Tribunal in its judgments awarding damages to each of the four officials.

" It must be obvious that judgments given by a Tribunal which is without jurisdiction over the subject-matter can have no validity."

Vice-President Badawi delivered the following Dissenting Opinion:

" I regret that I am unable to concur in the Opinion of the Court upholding the jurisdiction of the Administrative Tribunal of the International Labour Organisation in the four cases concerning Unesco. I agree with the conclusions reached by President Hackworth and Judge Read for the following reasons:

" The Request for Advisory Opinion submitted to the Court consists of three questions.

" The first question is expressed in terms of jurisdiction, and the third in terms of validity. Both these questions use the wording of Article XII of the Tribunal's Statute. Both represent the same order of ideas considered from different angles: from the angle of cause and the angle of effect. The link between the two questions is therefore indissoluble. The two questions in fact constitute but one.

" Question II is put in the event of the reply to Question I being in the affirmative. It would therefore be premature to examine it before answering Question I, for the purpose of giving an answer to it or of stating that it does not arise.

" The Administrative Tribunal of the International Labour Organisation has held that it had jurisdiction to hear the complaints of four Unesco officials. In order to examine these four judgments which, apart from the particular facts of each case, are identical, it will suffice to take Judgment No. 17 in the Duberg case as an example.

" It is obvious that to enable the Executive Board of Unesco to challenge the decision of the Administrative Tribunal confirming its jurisdiction and to request the advisory opinion provided for in Article XII of the Statute of the Tribunal, the grounds on which the Tribunal bases its jurisdiction must, independently of the merits, be in themselves sufficient to establish the precise legal basis of its jurisdiction. It would indeed be inconceivable that the Tribunal should be able to declare itself competent on the basis of reasons not subject to legal evaluation.

" However, it is sometimes the case that jurisdiction can only be established by reasons which are bound up with the merits. In such a case, a court orders the joinder of the objection to the jurisdiction and of the merits and deals with them together, giving its decision first on the issue of jurisdiction and then on the merits. Such joinder facilitates a better ordering of the judgment and is conducive to greater clarity. It also makes possible the avoidance of repetitions which are inevitable in the statement of the reasoning of the decision if the issue of jurisdiction and the merits are separately dealt with.

" A joinder of objection and merits, however, would only be possible if the tribunal dealing with the case has no superior court above it or, if it is a court of first instance, if its judgments are subject to appeal, that is to say if the whole judgment is subject to review. In the latter case, its decision, both as regards jurisdiction and merits, will be subject to review by the higher court.

" But in the case of Article XII of the Statute of the Administrative Tribunal, the Tribunal's decision is subject to examination by the Court only with regard to the question of jurisdiction; the Court has no power of review with regard to the merits, the Tribunal's judgments, so far as they are concerned, being final and without appeal.

" In order, however, to exercise its power of control over the jurisdiction of the Tribunal, the Court must necessarily base its Opinion on the Tribunal's interpretation and application of the provisions of its Statute.

" Where an objection to the jurisdiction is joined to the merits, the Court will seek this interpretation and application in the reasoning as a whole. But where the tribunal deals with the two questions, that of jurisdiction and that relating to the merits, separately, the Court will confine its examination to the reasoning on which the tribunal has based its finding that it has jurisdiction.

" If, however, the tribunal, while not ordering the joinder of the objection and of the merits, failed to observe the necessary distinction between the two questions and is satisfied with a mere division, in two sections in which the reasons are mingled, the Court is bound, if the section relating to jurisdiction does not contain adequate reasoning, to seek further in the other section. Although mixed up with the examination of the merits, the legal reasoning supplementaing that specifically referable to jurisdiction itself properly pertains to the issue of jurisdiction and is, therefore, subject to review by the Court.

" In the present case, no joinder was ordered by the Tribunal, but the Tribunal, while not deciding on that course, has in fact mixed up the grounds relating to the two questions, jurisdiction and merits. That part of the judgment devoted to jurisdiction contains—apart from certain observations which are not relevant and a mere reference to the Memorandum of July 6th, 1954—nothing but a recital of the complaint, followed by an assertion of the competence of the Tribunal. The part of the Judgment which deals with the merits gives a clearer indication of the Tribunal's ideas with regard to jurisdiction.

" This method of operation on the part of the Administrative Tribunal is clearly revealed by an examination of the two succeeding parts of the Judgment.

" But before undertaking this examination, it is desirable to establish the border line between jurisdiction and merits. The distinction between the two is fundamental for the exercise by the Court of its power of review.

" In order to determine the jurisdiction of the Tribunal, it is unnecessary for the claimant to prove his right (that pertains to the merits), but it is essential to define the basis of his action in order to ascertain whether it falls within the sphere of activity of the tribunal or, in other words, whether the tribunal is or is not competent to hear it.

" But, according to the words of Article II, paragraph 5, of the Statute of the Administrative Tribunal of the International Labour Organisation, the Tribunal is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations (of Unesco).

" The expression ' in substance or in form' (*soit quant au fond, soit quant à la forme*) does not here refer to the underlying meaning of the terms and provisions, as opposed to their liberal meaning. Such a contrast, indeed, would be odd in a legislative text. It is merely a reference to the well-known concept of ' substantive rules ' as contrasted with ' adjectival or procedural rules ' (*règles de fond, règles de forme ou de procédure*). This coupling of the two categories of rules is designed to put them on a footing of equality, in the sense that non-observance of either will give rise to judicial proceedings and that it is the duty of the Tribunal to safeguard and protect officials against their non-observance.

" According to paragraph 6 (*a*) and (*b*) of the same article, which lays down to whom the Tribunal shall be open, an official alleges non-observance of the terms of appointment or of the Staff Regulations for the purpose of asserting a *right*.

" It is therefore necessary for the official to state the right which he is claiming and to invoke the term non-observance of which has given rise to that right, to enable the Tribunal to find that it has jurisdiction after it has checked each of these, without, however, going into the facts relied upon to prove the case (the merits), from the point of view of their correctness, truth or reality, and without forming a judgment on the interpretation or application put forward by the official.

" This does not constitute an excessive requirement, but the complaint and the Tribunal's decision must, clearly, indicate the nature of the right claimed by the official and state the terms and provisions the interpretation or application of which might serve as a basis for that right and the probable, or possible, weight of these.

" The right claimed by the four officials is undoubtedly the renewal of their contracts. But what is the term or provision entitling them to that right which has not been observed by the Director-General ?

" It has been thought that the word ' alleging ', which is used in Article II of the Statute of the Tribunal, is not the same as the expression ' based on ' and that it has a wider and more flexible meaning. If the purpose of this observation is to show that it is unnecessary for the complainant to prove that the right which he claims is well-founded, the distinction is quite correct, and no one would disagree that the question of jurisdiction is clearly different from that of the merits.

" But if this distinction between the words has as its purpose to enable the complainant—who has to allege—to refer generally to the terms of appointment and the Staff Regulations, without indicating the precise terms and provisions the non-observance of which has given rise to his complaint, such an interpretation would fail to take into account certain necessities inherent in the drafting of legislative texts which commonly use the plural to include the singular.

" For the purposes of greater precisions, it was thought possible to interpret the provision relating to the ' allegation of non-observance . . . of the terms of appointment . . . and of provisions in the Staff Regulations ' as meaning that it was enough that there should be a legal relationship (without indicating either its name or its nature) between renewal and the original contract, between non-renewal and the legal position of the complainant at the time when renewal was refused, for the Tribunal to have jurisdiction.

" No doubt renewal is something different from an original appointment. In this connexion it is sufficient to observe that a fixed-term appointment may be transformed after five years into an indeterminate appointment, and that a fixed term appointment not so transformed may not be renewed beyond a maximum period of five years.

" This difference itself makes it possible to say that renewal is different in character from original appointment, but this difference does not make it possible—quite obviously and in spite of all the possible resources of legal dialectic—to give the official any title or right to renewal on the expiry of each fixed-term appointment. Every renewal amounts to a new appointment, without prejudice to the fact that a number of renewals would permit of the transformation of a fixed-term appointment into an indeterminate appointment if the Director-General, in his entire discretion, should wish to retain the services of the official.

" This is an argument similar in character to the statement that a fixed-term appointment does not cease, on its expiry, to produce legal effects. Apart from the fact that it begs the question, which is precisely that of ascertaining, in spite of the terms of Rule 104.6 (*d*), the extent of these legal effects and their source, this argument fails to reveal any definite concept of a right, although what has to be alleged is a right in the true sense of the word.

" In fact, there is no real difference between the words ' alleging ' and ' based on '. In each case, a precise term or provision ought to be cited, together with an indication of the right which it is claimed would enure from its non-observance and of the ' substantial and not merely artificial connexion ' between that right and the provision invoked.

" How, moreover, is it possible for the Court to check the existence or non-existence of a legal relationship or of legal effects which have not been relied upon by the complainants or found to exist by the Tribunal as a basis for its jurisdiction ? In any event, it is certain that if this interpretation should be accepted the result would be that there would be practically no case in which the Tribunal lacked jurisdiction, and review by the Court, provided for in Article XII, would in fact be impossible or useless.

" Let us now consider the reasons given in the Judgment on competence, which are the subject of seven paragraphs.

" The first paragraph draws a distinction between probationary and fixed-term appointments. The Tribunal perhaps wished to indicate that the former may be terminated at any moment *ad nutum*, whereas this is not the case of the latter. Apart from the fact that there is no such thing as a probationary appointment as an autonomous contract, but merely a probationary period in the first year of a fixed-term contract, this reason is irrelevant and constitutes a mere assertion by implication.

" The second paragraph quotes Unesco Staff Rule 104.6 (*d*), which provides that:

> ' A fixed-term appointment shall expire, without notice or indemnity, upon completion of the fixed term unless a renewal is offered and accepted three months before the expiry date in the case of an initial fixed-term appointment of one year, and six months before the expiry date in other cases'[1]

and states that this text only deals with the duration of the appointment and in no way bars the Tribunal from being seised of a complaint requesting the examination of the validity of the *positive* or negative decision taken regarding the renewal of the appointment.

" To begin with, it is incorrect that the provision deals only with the duration of the appointment, since it determines the legal situation as between Unesco and the officials. Again, a complaint requesting the examination of the validity of a positive decision regarding renewal is inconceivable. The Tribunal is in fact only open to officials and those claiming through them, and it is difficult to see how an official could attack the validity of a decision to renew his contract, since there can be no renewal in the absence of an acceptance by him.

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[1] The text in force at the time when the Director-General took his decision reads as follows:

" A fixed-term appointment shall expire upon completion of the fixed term unless a new appointment is offered and accepted three months before the expiry date, if the staff member has served for less than one year or six months before the expiry date, if he has served for more than one year."

" The Tribunal, nevertheless, states that Rule 104.6 (*d*) in no way bars it (notwithstanding its categorical terms) from considering the validity of a decision of non-renewal.

" Unesco has been at pains to explain that non-renewal does not constitute a decision, and it has relied for this purpose on the terms of Staff Rule 104.6 (*d*) and on the nature of the legal relationship between Unesco and the official. But without pausing to dwell on an examination of this aspect of the question, it is to be observed that at the end of June 1954 it could be known that Duberg's contract, which was due to expire on December 31st, 1954, would not be renewed because no offer of renewal had been made to him by that date, the offer being one which had to be made six months before the expiry of his contract. Providentially, there was the Administrative Memorandum of July 6th, which was followed, on August 13th, by a letter from the Director-General to Duberg informing him that his contract would not be renewed. There is therefore no difficulty in admitting that there was a decision not to renew.

" In fact, the Tribunal's declaration that Rule 104.6 (*d*) was not a bar to its adjudication on the validity of a decision not to renew showed that it was preparing to say that, in spite of that provision, there existed, within certain limits, either a right of the official to renewal, or an obligation upon the Director-General in this respect.

" The following paragraph appears to lend substance to this idea. That paragraph cites the Administrative Memorandum of July 6th, 1954, which is referred to as ' a general measure ' (*une mesure d'ensemble*) and in the next paragraph as ' a general measure ' (*une mesure générale*) to which the complainant was made an exception.

" In the fourth paragraph, the Tribunal summarizes Duberg's complaint in these words: ' The Director-General could not legitimately thus make an exception of him on the sole ground which he invoked against him as justification for the view that he did not possess the quality of integrity recognized in those of his colleagues whose contracts had been renewed, and in the absence of any contestation of his qualities of competence and efficiency.'

" (In his complaint the complainant maintained that ' he had—in circumstances clearly determined by the Administration—*an acquired right to the renewal of his contract* and that this assurance was more than a mere hope '. He relied on the Administrative Memorandum of July 6th, 1954, and dealt at length with the facts relating to his career and with the concept of integrity, the reason invoked by the Director-General for not renewing his contract.)

" The following paragraphs of the Judgment (relating to jurisdiction) add nothing to the reasoning already given: paragraph 5 states the submissions of the complainant; paragraph 6 says that the question is *thus* a dispute concerning the interpretation and application of the Staff Regulations and Rules of Unesco, and paragraph 7 states that, by virtue of Article II, paragraph 1,[1] the Tribunal is competent to hear it.

" Apart from the reference to the Memorandum of July 6th, 1954, these seven paragraphs, which constitute the whole of the reasoning on the question of jurisdiction, fail completely to state the basis of that jurisdiction.

" The one and only ground on which the Tribunal founds its jurisdiction therefore appears to be the Memorandum of July 6th.

" By placing the emphasis on the Memorandum of July 6th, in its reasoning on the question of jurisdiction, and by its description of it as a ' general measure ', the Tribunal seems to be adding it to the sources of the officials' rights (contract and Staff Regulations and Rules). Did this Memorandum really constitute a new source of such rights, to the extent to which it modified the Staff Regulations and Rules ?

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[1] The Tribunal's reference is incorrect, since this paragraph relates to the International Labour Organisation, whereas it is paragraph 5 which applies to Unesco.

" A lively controversy has been engendered as to the scope of the Memorandum. In the view of some, it was merely a declaration of policy, an obviously expedient statement which did not and could not alter the character of relationships created by the contracts and the Staff Regulations and Rules.

" The Director-General found himself in a dilemma:

" he either had to transform fixed-term contracts into indeterminate appointments without regard to programme requirements,

" or else not to renew such contracts.

Since he had to seek directives from the Conference, which was to meet in November 1954, the Director-General proposed, pending a settlement of the question on a solid foundation *involving the establishment of a permanent cadre*, to grant a general one-year renewal in the circumstances which he indicated. This announcement in no way implied that the normal rules would not be observed, namely, the necessity for an offer and an acceptance, or that he had abandoned his rights, since surrender of a right cannot be presumed.

" For those holding this view, it is difficult to understand how a declaration made after the date prescribed for an offer of renewal—as in the case of the four complainants—can give rise to new rights. In their view Rule 104.6 (*d*), even in its revised form, consequently remains in force and should be applied. Failing an offer and an acceptance, the appointment expired on December 31st, 1954, without notice or indemnity. According to this interpretation, there was no right to renewal and, in the absence of non-observance of any term or provision, the Tribunal was incompetent to hear the complaint.

" This obviously was not the opinion of the Tribunal, which regarded the Memorandum as having the character of a general measure or of a regulation provisionally modifying the régime then in force and which considered that the officials were entitled to the benefit thereof.

" The Tribunal, however, was unable to hold that the Memorandum gave right to a renewal of the appointment or to an obligation on the part of the Director-General to renew it, as claimed by the applicant in his complaint. The Tribunal contented itself with stating that ' an official who combines all the necessary qualities has a *legitimate expectancy* (*espoir légitime*) of being offered a new appointment in the position which he occupied '.

" But does the disappointment of a legitimate expectancy or hope constitute non-observance of the terms of appointment or of the provisions of the Staff Regulations ? So to hold would be to attribute to legitimate expectancies a legal substance not warranted by any legal principle.

" However that may be, is it necessary for the Court to choose between these two conflicting views—a ' declaration of policy ' on the one hand, which would involve a finding that the Tribunal lacked jurisdiction on the ground that it had incorrectly defined the legal position, or ' a general measure ' on the other hand, which would involve a finding that the Tribunal had jurisdiction?

" Such a choice would not in fact resolve the problem of jurisdiction, for, even regarded as a general measure, the Memorandum could not by itself serve as a basis for the Tribunal's Judgment confirming its jurisdiction.

" The Memorandum indeed did not envisage an offer of renewal to all professional staff members in an absolute manner. The offer was made subject to conditions covering the need for their services and the achievement of the required standards which necessarily were to be determined by the Director-General.

" In these circumstances, there could not be any non-observance of the terms of appointment or of the provisions of the Staff Regulations if non-renewal was based on the absence of any need for the services of the official or on the failure to achieve the required standards, and in such a case there could be neither any right nor any legitimate expectancy or hope on the part of the official that his contract would be renewed.

" The Memorandum, which made renewal subject to these conditions of need for the services and of achievement of the required standards, cannot justify an assumption of jurisdiction in proceedings based upon some right of an official, providing it be granted that judgment of the satisfaction of the conditions is within the discretion of the Director-General.

" But the Tribunal does not appear to admit this so far as the condition of integrity is concerned. It appears not to have had any difficulty about admitting it so far as the other conditions are concerned.[1] The whole section devoted to an examination of the merits deals only with the discretionary power of the Director-General and at the outset the Tribunal states that ' *if the Director-General is granted authority not to renew a fixed-term appointment and so to do without notice or indemnity, this is clearly subject to the implied condition that this authority must be exercised only for the good of the service and in the interest of the Organization* '.

" The Tribunal, postulating that the exercise of this power, subject to the implicit conditions which it has indicated, should be subjected to its judicial control, proceeds to an examination of the facts and to a definition of the condition of integrity, and it concludes ' that the decision not to renew the appointment is one which should not only be rescinded in the present case, but also constitutes a wrongful exercise of powers and an abuse of rights which consequently involves the obligation to make good the prejudice resulting therefrom '.[2]

" Since the Court must review all the grounds on which the jurisdiction of the Tribunal is founded, and since it must seek them wherever they may be found, the Court must stress this ground as being the principal ground on which the Tribunal relied in declaring that it had jurisdiction and in dealing with the merits. In the portion of the Judgment devoted to the question of jurisdiction, the Tribunal stated that ' the question is a dispute concerning the interpretation and application of the Staff Regulations and Rules of Unesco ', but it did not indicate the provision involved, apparently leaving this to the examination of the merits.

" The reference in this part of the Judgment to the Memorandum of July 6th was merely paving the way for these *implied conditions* inasmuch as the Memorandum constitutes the document to which reference must be made and which contains the *conditions* to which the Director-General made his general offer of one-year renewals subject. The Tribunal did not rely on the Memorandum in any other way, nor did it draw any other conclusion from it.

" It will, however, be observed at the outset that the Tribunal did not seek to base its Judgment on any right enjoyed by the official himself, by virtue of his contract or of the Staff Regulations, but on conditions relating to the Director-General's right or to his discretionary power which, if not satisfied, would give rise to a wrongful act (*détournement de pouvoir*) involving a right of the official to be compensated (by money or otherwise).

" It may next be observed that these ' implied conditions ' have nothing to do with good faith, which is the basis of any contract and, accordingly, an implied condition inherent in its performance. In fact, the Tribunal's analysis of the good of the service and the interest of the Organization reveals an appreciation by the Tribunal of these criteria which differs from that of the Director-General but which does not go so far as to question his good faith.

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[1] This distinction was not, however, justified by the Tribunal, in spite of the fact that in an international political organization such as Unesco the concept of integrity should have, apart from its etymological meaning, a relative and wider meaning.

[2] The wording here used implies the existence of two grounds, but a careful reading of the Judgment reveals no ground other than that of *détournement de pouvoir* which is the natural conclusion following from the implied conditions postulated and gone into at length by the Tribunal.

" Finally, it may be observed that ' implied conditions ' cannot be regarded as provisions non-observance of which would constitute a basis for the jurisdiction of the Tribunal. Such provisions clearly cannot be anything but express and positive provisions. That this is so appears clearly from the use in the article of the words ' in substance or in form '.

" But if these implied conditions do not constitute the terms and provisions referred to in Article II of the Statute of the Tribunal, is it possible that they might constitute the interpretation or application of such terms and provisions? Interpretation is undoubtedly of the essence of the administration of justice, but judicial interpretation presupposes the existence of a text to be interpreted. Moreover, interpretation is subject to certain rules which are susceptible of control.

" What is the term or provision which the Tribunal, in the cases submitted to it for judgment, has interpreted or applied and what are the rules which it followed?

" The Tribunal proclaims the existence of implied conditions by way of a mere assertion, and it fails to explain the paradox of a discretionary power subject to judicial control. The conclusion reached by the Tribunal that non-renewal constitutes a *détournement de pouvoir*, shows that it regarded itself as having jurisdiction to deal with a *détournement de pouvoir*. But such a power cannot be presumed to be inherent in administrative justice. Though the French *Conseil d'État* may have exercised it after a lengthy evolution and as a result of a series of decisions which may be described as praetorian, the administrative tribunals established in various countries only exercise it by virtue of express provisions.

" So far as the French *Conseil d'État* is concerned, the concept of *détournement de pouvoir* is a theory of historical growth due to the rôle which the *Conseil* has played in French life, to its structure, to its functions and, above all, to the successive extensions of its competence due to its power to build up a veritable case law.[1] Even in France, resort to the theory is in general less frequent.

" A writer, Professor Jean de Soto, in an article entitled ' *Recours pour excès de pouvoir et interventionnisme économique* ', published in the Collection ' *Conseil d'État, Études et Documents* ', 1952, No. 6, pages 77–78, seeks to explain this fact:

> ' . . . What is the explanation for this disaffection with regard to *détournement de pouvoir*? Perhaps a certain disillusionment, for a form of control of this sort may seem deceptive. . . . Above all, no doubt, administrative tribunals have thought that by themselves precisely determining the special purpose which professional and economic authorities should have in mind in forming their decisions in respect of their every act, they were adjudicating upon matters outside their ken and that their official assertions with regard to the ultimate purpose might endanger their prestige in the eyes of the public; it should be added that it was not always easy to ascertain this ultimate purpose and that the necessary experience was often lacking for the forming of any sure opinion.'

" However that may be, when, as a result of the development of the French institution of the *Conseil d'État*, certain countries desired to establish Councils on the French model, they deemed it necessary to crystallize the case law which had been developed by the *Conseil d'État* over a century and a half, by conferring on their new Councils a jurisdiction which was at once wide and well-defined, in order to avoid the incoherence and uncertainty involved in the building up of a case law, the direction of which was in any event unsure, and in order to avoid any resistance on the part of the Administration or any conflicts with it.

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[1] *Cf.* an article by President Josse, in the *Livre jubulaire du Conseil d'État pour commémorer son 150me anniversaire*, 1949. See also an article by Professor Pierre Lampué, published in the *Revue internationale des Sciences administratives*, 1954, p. 383.

" By way of examples of such texts, which are to be found in many countries in Europe, I shall content myself with citing Article 22 of the Greek Law of December 22nd, 1928; Articles 11 and 23 of the Turkish Law of December 26th, 1938; Article 9 of the Belgian Law of December 23rd, 1946; Article 33 of the Treaty establishing the European Coal and Steel Community of April 18th, 1951 (*cf.* Article 3 of the Egyptian Law No. 9 of 1949, amending Law No. 112 of 1946 which brought the Conseil d'État into being). (See Annex.) These provisions which recognize the doctrine of *détournement de pouvoir* entrust the necessary judicial control to the *Conseil d'État* or to the Court of the Community.

" If these various laws have considered it necessary to make express provision for *détournement de pouvoir* as an element of jurisdiction and not as a substantive rule, that is because such a ground of appeal cannot be regarded as automatic and because it is not a necessary consequence of the general power of annulment conferred on *Conseils d'État.* This form of appeal in fact relates to the exercise of the discretionary power of the Administration, and it involves, independently of judicial control over the interpretation and application of legislative provisions and regulations, a searching enquiry into the purpose of such provisions and into the way in which that purpose has been circumvented or disregarded, as well as an enquiry into the reason for the misuse of the power.

" There are indeed two possibilities: *either* in the absence of a provision conferring special competence in respect of *détournement* or *abus de pouvoir*, these *Conseils d'État* may exercise such a special competence by virtue of their general power of annulment for breach of the law, in which case it may be asked why, in framing the Statutes establishing *Conseils*, it was considered necessary to make provision for such special competence, *or* such provision was necessary and without it the *Conseils* could not exercise the power in question. It is the second of these alternatives which clearly must be accepted.

" The seriousness of such interference in administrative matters and of the substitution of the views of courts for those of responsible administrators clearly militates against the presumption that such a power can be deemed to be included within the normal concept of the interpretation and application of laws and regulations. Accordingly, apart from the case of the French *Conseil d'État*, which in the course of the development of its case law over a period of more than 150 years has elaborated so many theories which constitute the foundations of that unwritten law, administrative law, an express provision has always been considered necessary.

" But the jurisdiction of the administrative tribunals of international organizations is in no way comparable to that of the various national judicial systems which include a body of the *Conseil d'État* type. No one will dispute that the jurisdiction of the Tribunal, as defined by Article II of its Statute, is a limited jurisdiction and that it is restricted to questions of non-observance of terms of appointment and of the Staff Regulations. It is this very restriction which provides the *raison d'être* for the procedure for requesting an advisory opinion of the Court, which is provided for by Article XII of the Statute of the Tribunal.

" Might it nevertheless be considered that since it is not a tribunal deciding as between States, in which case a restrictive interpretation will be necessary as a result of the principle of the sovereignty of States, the jurisdiction of the Tribunal of the International Labour Organisation should be liberally interpreted on the basis of the Charter and of the modern tendencies to provide certain guarantees for the status of officials, or that it should be interpreted in such a way as to provide security for the international civil service?

" It is clear that the constitution of the Tribunal, even with its limited competence (*compétence d'attribution*) reflects these tendencies. It would then be necessary to determine at what point such a liberal interpretation should cease in order not to bring about a change in the character of the Tribunal, altering it from a tribunal with a limited competence to one having full administrative jurisdiction including powers of annulment in cases of *détournement de pouvoir*. Such a liberal or extensive interpretation would not thus lead to any precise conclusion.

" Such a liberal or extensive interpretation is the less acceptable in the present case in that the jurisdiction of the Administrative Tribunal of the International Labour Organisation, so far as the staff of Unesco are concerned, is the result of an agreement between the latter Organization and the International Labour Organisation under which the former is entitled to rely on the precise limits to the jurisdiction as defined in Article II, paragraph 5, of the Tribunal's Statute.

" Moreover, it is difficult to conceive that, in the case of a tribunal starting out without any traditions and whose only function is to ensure respect for the contracts and the status of a civil service in the process of formation, it can have been the intention to grant it powers as wide as those which may be involved by the concept of *détournement de pouvoir* in relation to administrative heads (the Secretary-General or Director-General), subject to the hierarchical control of higher bodies (in this case, the Executive Board and the General Conference of Unesco) and acting on the instructions or with the agreement of those bodies.

" It is true that in the days of the League of Nations M. Albert Thomas suggested the establishment of an administrative tribunal on the model of the French *Conseil d'État*. But after this suggestion, and before its implementation, the question passed through a number of committees which did not proceed on the basis of this idea. It is not therefore possible to place reliance on administrative decisions or on the administrative law of the various countries in an effort to attribute to the administrative tribunals of international organizations the same powers as are enjoyed by national legal systems.

" The fact that the Tribunal was called an administrative tribunal does not automatically confer upon it the powers of *Conseils d'État* in various countries. The Tribunal is ' administrative ' because it has no powers beyond those which relate to the administration and the officials. By reason of this intrinsic character, it is nothing more than a judicial organ with limited powers which it must exercise in the same way as any other judicial tribunal, that is to say, it must interpret and apply the terms of appointment of officials and the provisions of the Staff Regulations. The Tribunal itself said so in the sixth paragraph of the section of the Judgment devoted to competence.

" An entirely different matter is the judicial control of the discretionary exercise of the powers of the Administration; this is a quite special matter which can only appertain to a type of court which bears the same relationship to the Administration as do the *Conseils d'État* in the various countries which have adopted that institution.

" In fact, the duality of their functions as an advisory body and as a court having jurisdiction to annul decisions, in the words of MM. Puget and Maleville, in a study on the ' *Revision des décisions administratives sur recours des administrés* ', undertaken by the *Institut international des Sciences administratives* for the United Nations (1953), ' effects a conciliation which is perhaps illogical but certainly felicitous between the contradictory necessities of keeping the administrative judge apart from the power to decide issues in the continual activity and operation of departments and of allowing him to plunge constantly into the realities of administrative tasks. . . . This duality ensures that he is at all times in close contact with living realities, and it is favourable to flexibility and progress. It is to the benefit both of those who administer and those who are administered.'

" There is not only this duality of the functions of the *Conseil d'État* as a basis for the extension of its competence and of its control penetrating to the acts of the Administration, but as a basis for this extension and control there is also the duality of a judicial jurisdiction and an administrative jurisdiction: the former limited to the interpretation and application of existing texts, the latter developing administrative law, to a great extent unwritten law, particularly from the point of view of its general principles.

" The case of the Administrative Tribunal of the International Labour Organisation is, however, something quite different from a *Conseil d'État*. It is an exclusively judicial tribunal, although administrative in name. There is not here, therefore, any duality of function or of jurisdiction.

" The difference between the Tribunal and a *Conseil d'État* is fundamental, and it cannot be otherwise both as regards the atmosphere in which the Tribunal exercises its jurisdiction and as regards the complex conditions of the functioning of international organizations.

" As justification for the extraordinary powers which international administrative tribunals claim to possess, one of the defenders of the system, Professor Georges Langrod, speaking of the Administrative Tribunal of the United Nations, said: ' The Administrative Tribunal, that newborn judicial body, with limited jurisdiction and without direct traditions on the intergovernmental plane, should not only impose its authority in the face of repeated attempts to cast doubt on the character of *res judicata* of its judgments, that is, undertake a mission of a " pedagogical " order, but it should go farther —in view of the meagreness, so far as substance is concerned, and of the endless fluctuation, so far as the form of the *internal law* of the United Nations is concerned—and bring about, almost *ab nihilo*, a real body of case law, as did the Roman praetor.' (*Rivista di Diritto Internazionale*, 1954, p. 245.) The author of these words fails to indicate the legal provisions or the authority which would justify such an extended and praetorian power of administrative tribunals. This conception of the powers of administrative tribunals is obviously without any foundation. The present state of international administrative law provides no sanction or authority therefor.

" Other arguments have been invoked in order to justify the competence of the Administrative Tribunal of the International Labour Organisation to exercise a judicial control over the discretionary powers of the Director-General, such as the statistics of fixed-term appointments, the special features of such appointments, the general (but by no means absolute) practice that they are renewed,[1] the necessity of ensuring stability and security within the international civil service. These are extra-legal, I might even say political, considerations. International organizations have an undoubted interest in settling these questions by general measures and have more effective means of dealing with them than administrative tribunals, dealing with individual cases, can possibly have.

" In support of the jurisdiction of the Administrative Tribunal of the International Labour Organisation, decisions of other administrative tribunals have been cited, in particular:

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[1] There was no examination by the Court nor discussion before the Administrative Tribunal of the precise scope of this practice or of the facts relevant thereto, namely, the part played in the formation of the practice by the examination in each individual case of the need for the services of the official and his having achieved the necessary standards (of efficiency, competence and integrity). In any event, while it is always desirable in interpreting texts not to have regard only to the letter of the provisions but to bear in mind the spirit of the texts, this so-called practice cannot be assimilated to the spirit of the provisions of the Staff Regulations.

"1. Howrani *v.* Secretary-General of the United Nations, Judgment No. 4—September 14th, 1951.[1]

"2. Robinson *v.* Secretary-General of the United Nations, Judgment No. 15—April 11th, 1952.[2]

"3. Kergall *v.* European Coal and Steel Community—July 18th, 1955.[3]

"Without examining these judgments in detail, it may be pointed out that none of these judgments adopted the doctrine of *détournement de pouvoir* as openly as the four judgments now in question.

"Moreover, neither the Statutes of these Tribunals nor the Staff Regulations of these Organizations are identical with the Statute of the Administrative Tribunal of the International Labour Organisation and the Staff Regulations of Unesco.

"Furthermore, the instrument establishing the European Coal and Steel Community expressly confers on the Court of the Community the power of annulment on the ground of *détournement de pouvoir* in certain cases (Art. 33) (see Annex).

"Finally, it is difficult to see how the decisions of tribunals of the same standing as the Administrative Tribunal, whose judgments are subject to review by the Court, decisions never sanctioned by this Court, can serve as authorities justifying the present judgments.

"It is necessary to remember in connexion with these arguments and similar arguments referred to at the beginning of the present Opinion that they were not relied on by the Administrative Tribunal itself, which placed itself on an altogether different ground, that not of a right of the official but of a wrongful act relating to the exercise of the Director-General's power—*détournement de pouvoir*.

"Since the task of the Court is to give an Opinion on the challenge raised against a concrete decision of the Tribunal confirming its competence, the Opinion should naturally relate to the grounds on which the Tribunal held that it had jurisdiction. In general, the Court's rôle should not be to examine the Tribunal's jurisdiction and to adjudicate upon it *proprio motu*.

"This limitation is necessary particularly in a case where the Tribunal adopted an element of jurisdiction such as *détournement de pouvoir*, which has not been conferred upon it, in the guise of a ground for its finding on the merits.

"The Tribunal's judgment on the merits has thus been influenced by this arbitrary arrogation of jurisdiction. The result is an inextricable confusion between jurisdiction and merits.

"The Court has several times stated that it is not called upon to give an Opinion on the merits of the case the judgments of which have been submitted to it, but it has at the same time sought bases for the jurisdiction of the Tribunal other than those relied upon by the Tribunal itself.

"In upholding the jurisdiction of the Tribunal, however, on different grounds, the Opinion of the Court cannot fail to clothe the Tribunal's judgment on the merits with an authority in no way intended by the Court.

"In fact, even if the Tribunal had founded its jurisdiction on the practice with regard to fixed-term appointments, on the special position which that practice occupies in international organizations, on the Memorandum of July 6th, 1954, it could not, without the assistance of *détournement de pouvoir*, have done otherwise than dismiss the complaints of the officials. Neither the practice, the legal relationship between renewal and the original contract or the legal effects which a fixed-term appointment continues to produce after

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[1 See *International Law Reports*, 1951, Case No. 142.]

[2 *Ibid.*, 1952, Case No. 111.]

[3 Reported *infra*, p. 628.]

its expiry, nor an examination of the terms of appointment or of the Staff Regulations or of the Rules or of the Memorandum of July 6th, would have provided the Tribunal with *a basis for a right resulting from non-observance* of the terms of appointment or of the provisions of the Staff Regulations.

" The Tribunal seems to have examined all these possibilities itself. But all it could deduce was ' that an official who combines all the necessary qualities has a legitimate expectancy (*espoir légitime*) of being offered a new appointment in the position which he occupied '.

" A *détournement de pouvoir* alone—a special competence which it did not possess—was able to provide the Tribunal with the bases for its Judgment.

" In the conditions in which international organizations operate, mistakes are possible. But these mistakes, however serious they may be, cannot justify an extension of the jurisdiction of international administrative tribunals which is contrary to their Statutes, to the conditions in which they operate and to the conditions in which international organizations operate.

" The formative period through which international administration is at present passing will in due course come to an end. It is then that it will be possible and practicable to adopt rules which are applicable to national administrative courts. Among such rules, that relating to *détournement de pouvoir* might become a part of the law of the future. That it will is the hope expressed by Professor F. Chiesa, in a report to the Ninth International Congress of Administrative Sciences, 1953, which is published in the *Revue internationale des Sciences administratives*, 1954, n° 1, page 67:

> ' Moreover, all administrative tribunals should be given a general jurisdiction to control the validity of all administrative measures taken by the United Nations and other international Organizations in order to eliminate from the field of law all measures vitiated by lack of competence, *abus de pouvoir* or breach of the regulations or rules, as well as a jurisdiction of appraisal, a jurisdiction on the merits, to enable the tribunals to proceed to a consideration of the substance of the case and the law involved.'
>
> ' In the present situation, it is not yet justifiable to think of an administrative jurisdiction, on an international level, in terms of its definition as it is given in national legal texts. Most of the international administrative jurisdictions now in existence are confined in their competence to litigations pertaining to international officialdom, whereas it should be permissible to refer to a judge the question of whether or no an organ of an international organisation has exceeded its powers or has misused its competence within its powers.' *Summary of the article in English given in the Revue.*

" But until then it is to the international legislator and not to the administrative tribunal that the right or the duty pertains to choose the public law doctrine (*détournement de pouvoir*) or the private law doctrine (*abus de droit*) which the Administrative Tribunal saw fit to include together in one of the recitals of its Judgment.

" For all these reasons, I am of opinion, so far as Question I is concerned, that the Administrative Tribunal of the International Labour Organisation was not competent, because the essential basis on which it held itself competent is what is called the ' implied conditions ' of the Director-General's power, a postulate designed to enable it to deal with acts reserved for his discretion, in order to submit them to judicial review and to rescind these discretionary administrative acts on the ground of a *détournement de pouvoir*. Such a competence was not conferred upon it by Article II of its Statute.

" Question II does not arise.

" The reply to Question III is that the Judgment[s], based on a foundation which does not exist, are nullities."

" *Annex*

Greece

Law of December 22nd, 1928.

Article 22.

. . . .

" The full Council shall sit:

(*a*) when considering applications for rescission of administrative measures on the ground of *excès de pouvoir* or for breach of a law."

Turkey

Law of December 26th, 1938.

Article 11.

" The functions of the *Conseil d'État* include:

. . . .

(*d*) dealing with and deciding applications and appeals in contentious administrative matters."

Article 23.

" The *Sections du contentieux* shall finally and definitively consider the following matters:

A. Proceedings brought by those claiming to have suffered injury as a result of acts and decisions of an administrative character relating to questions outside the jurisdiction of judicial tribunals;

. . . .

C. Proceedings for annulment brought by those claiming to have suffered injury as a result of acts and decisions of an administrative character alleged to be in conflict with the provisions of laws and regulations, so far as their purpose and their substance are concerned, and from the point of view of procedure and jurisdiction ".

Belgium

Law of December 23rd, 1946.

Chapter II.—Judgments.

" 9. The Administrative Section shall adjudicate by means of judgments on claims for annulment on the ground of a defect of procedure which is of a substantial character or where the sanction for departure therefrom is annulment, on the ground of *excès* or *détournement de pouvoir*, alleged against the acts or regulations of the various administrative authorities or against contentious administrative decisions."

Egypt

Law of 1946 on the *Conseil d'État*, as amended in 1949.

Article 3.

" The Contentious Administrative Court is alone competent to adjudicate upon the following questions and possesses unlimited jurisdiction over these questions.

. . . .

6. Appeals lodged by private persons or corporate bodies for the rescission of final administrative decisions.
The appeals referred to under 3, 4, 5, 6 must be based on lack of jurisdiction, on a formal defect or on a breach or erroneous application or interpretation of laws or regulations, or on a *détournement de pouvoir*."

Treaty establishing the European Coal and Steel Community, of April 18th, 1951

Article 33.

" ' The Court shall have jurisdiction over appeals by a member State or by the Council for the annulment of decisions and recommendations

> of the High Authority on the grounds of lack of legal competence, major violations of procedure, violation of the Treaty or of any rule of law relating to its application, or abuse of power. However, the Court may not review the High Authority's evaluation of the situation, based on economic facts and circumstances, which led to such decisions or recommendations, except where the High Authority is alleged to have abused its powers or to have clearly misinterpreted the provisions of the Treaty or of a rule of law relating to its application.
>
> 'The enterprises, or the associations referred to in Article 48, shall have the right of appeal on the same grounds against individual decisions and recommendations affecting them, or against general decisions and recommendations which they deem to involve an abuse of power affecting them.
>
> 'The appeals provided for in the first two paragraphs of the present article must be lodged within one month from the date of notification of publication, as the case may be, of the decision or recommendation.' "

Judge Read delivered the following Dissenting Opinion:

" I regret that I am unable to concur in the answers given by the majority of my colleagues to the Questions submitted in the Request. In general I agree with the position taken by President Hackworth and Vice-President Badawi, but there are certain aspects of the matter, which, in my opinion, deserve special consideration.

" My difficulties in concurring in the Opinion are fourfold. They concern: the nature and significance of the notion of competence or jurisdiction; and the problems of interpretation arising under Article XII, paragraph 1, of the Statute of Administrative Tribunal, the clauses in the Judgments which purport to confirm its jurisdiction, and Question I.

" My first difficulty relates to competence or jurisdiction. This notion is the principle that a Tribunal must keep within the limits imposed by law, or by the instrument under which it operates. It applies at all stages of proceedings: commencement; pleadings; oral proceedings; and, above all, at the crucial stage, delivery of judgment

" Lack of competence may be raised by preliminary objection, or during the examination of the merits. In preliminary proceedings, the tribunal may simply reject the objection to the jurisdiction, or it may decide, at that stage, that it is competent: but either finding is interlocutory. In any event, if, in the course of the examination of the merits, it is established by a party, or the tribunal finds of its own motion, that it is incompetent to adjudicate, it cannot proceed to judgment. This does not mean that the problems of competence and merits are the same. They are separate in principle, although there may be issues of fact and law that are common to both. What it does mean is that it is the duty of every tribunal—when the relationship of the parties, the essential character of the cause of action, and other matters relevant to jurisdiction have been established—to satisfy itself that it is competent to deliver the judgment and thus to complete the hearing of the case.

" This confirmation of jurisdiction is a finding by the tribunal that, in adjudicating, it is acting within the scope of its authority to adjudicate, prescribed by law and by the statute under which it operates. It has nothing to do with the question whether the decision is right or wrong: that is merits. It is concerned solely with the duty of the tribunal to respect and maintain the limits imposed on its authority; the rightness or wrongness of the decision being irrelevant considerations.

" My second difficulty relates to the interpretation of Article XII of the Statute, which provides that:

> ' In any case in which the Executive Board . . . challenges a decision of the Tribunal confirming its jurisdiction, . . . the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.'

" I am disregarding the provision relating to procedural fault, which was eliminated from the case by Unesco.

" Four expressions present problems of interpretation: ' challenges '; ' decision of the Tribunal confirming its jurisdiction '; ' the question of the validity of the decision '; and ' shall be submitted '. The first three are directly involved in this case.

" There are two ways of construing a text. It can be given its ordinary and natural meaning; or, when that does not make sense, it can be given a meaning which, while not doing violence to the words used, is in conformity with the context and the general tenor of the document, and which will give effect to the general intentions of its authors, as indicated by its terms and by attendant circumstances. I shall refer to the first as literal, and to the second way of construing the text as liberal interpretation.

" The expression ' challenges a decision ', if literally construed, would connote the fact of challenge and not its substantial quality. Unesco, acting under Article XII, did challenge the whole Judgment, in terms broad enough to constitute a challenge to the decision confirming jurisdiction. Literally construing the word ' challenges ', it would follow that the Executive Board was empowered to submit the validity of the decision to this Court, regardless of whether or not it could substantiate the challenge. But it has been universally accepted that Unesco can only require the Court to rule on validity if the challenge proves to be well-founded. All unite in applying a liberal interpretation.

" Similarly, liberal interpretation has been given to the last two expressions referred to above. Strictly, ' the question of the validity of the decision ' would cover all aspects of validity, but it is universally accepted that it must, in order to give effect to the general intention of the authors, be restricted to those aspects of validity or invalidity which result from the competence or incompetence of the Tribunal. Literally, ' shall be submitted ' is imperative; but it is recognized that the Executive Board is under no compulsion but exercises its political judgment in deciding whether or not to submit the question to the Court.

" The second expression—' decision of the Tribunal confirming its jurisdiction '—gives more difficulty. It is impossible, on the basis of literal construction, to confine the words to decisions that the Tribunals were competent to entertain the complaints, and to listen to the witnesses and counsel, i.e. to exercise the less important aspects of jurisdiction, because the authors did not choose to use the words ' confirming the preliminary and relatively unimportant elements of jurisdiction, but ignoring the crucial element, the delivery of judgment '. But I do not feel justified in giving a liberal interpretation to the first three expressions with which I have dealt, and at the same time imposing a literal construction on the expression now under consideration. Accordingly, I shall examine the nature and historical background of the Article and its relation to other parts of the Statute.

" A precedent was established in 1946 when the Assembly of the League of Nations refused to give effect to certain judgments of the Administrative Tribunal, on grounds of nullity. Some of the officials were from the International Labour Organisation and when the Organisation was taking over the League Tribunal and Statute, it became necessary to cope with the problem presented by the precedent. This was a serious matter, because it imported into the relation between official and organization an arbitrary element, and destroyed security of tenure. It was, however, impossible to reverse the precedent, because many members were not prepared to accept a position in which a judgment of the Tribunal which was null and void would be binding on the Organisation. A compromise was reached and embodied in Article XII.

" Prior to the adoption of Article XII, the officials were at the mercy of the Organisation, because there was no legal sanction against possible action in treating a judgment as a nullity. Under Article XII, provided that it is liberally construed, the Organisation can only treat a judgment as invalid if it has been found to be so by this Court.

" For ten years, the provisions of Article XII have stood out as the only safeguard giving effective protection to officials from arbitrary action by the Organizations. Restrictive construction of the expression under consideration, confining the effect of this safeguard to cases in which there can be found a decision of the Tribunal limited to the preliminary and relatively unimportant elements of jurisdiction, would narrow the scope of the safeguard, and enlarge the field in which officials were at the mercy of the Organizations. I am compelled to give a broad and liberal interpretation to a remedial measure, designed to ensure justice and to prevent arbitrary action.

" Apart from the historical background, which so strongly indicates the need for broad and liberal construction, the context suggests the same need, with equal force. Here I shall mention only one point: Article VIII. The scope of the judgment to be given by the Tribunal was rigidly confined. It was given competence to ' order the rescinding of the decision impugned or the performance of the obligation relied upon '. In the event that these courses proved to be impossible or inadvisable, competence was given to ' award compensation for the injury caused . . .'. The language was imperative, and it is clear beyond argument that the authors of the Statute intended to confine the Tribunal to these forms of redress. There was no way in which an Organization could know that the Tribunal was delivering a judgment which, in the matter of redress, was beyond its competence, until after the judgment had been delivered. That would be too late for argument, too late for anything but the procedure under Article XII.

" Restrictive construction would thus render nugatory the limitations imposed by Article VIII and it is therefore unacceptable to me.

" It thus appears that a literal examination of the words ' decision of the Tribunal confirming its jurisdiction ', a survey of the historical background, and the context, all unite in compelling me to adopt a broad and liberal construction. I am convinced that the authors of the Statute had in mind all elements of jurisdiction and that they did not intend to exclude the crucial element, the delivery of judgment.

" My third difficulty in concurring in the Opinion relates to the interpretation of the clauses in the Judgments of the Tribunal which deal with jurisdiction.

" The first is the seventh clause appearing under the heading ' ON COMPETENCE ', which reads:

> ' that by virtue of Article II, paragraph 1, of its Statute, the Tribunal is competent to hear the said dispute; '

The reference to paragraph (1) is an obvious clerical error. It must be treated as referring to paragraph (5), but this is of no importance as the link with Article II of the Statute was abandoned in the dispositive. To avoid confusion I shall refer to this clause as the tentative finding on competence.

" The second clause, to which I shall refer as the decision confirming jurisdiction, is in the dispositive. Together with the preceding and following clauses, it reads:

'ON THE GROUNDS AS AFORESAID

'THE TRIBUNAL,

'Rejecting any wider or contrary conclusions,

'Declares the complaint to be receivable as to form;

'*Declares that it is competent;*

'Orders the decision taken to be rescinded and declares in law that it constitutes an abuse of rights causing prejudice to the complainant;

'In consequence, should the defendant not reconsider the decision taken and renew the complainant's appointment, orders the said defendant to pay to the complainant the sum of $15,500, together with interest at 4 per centum from 1 January 1955;

'Orders the defendant Organisation to pay to the complainant the sum of $300 by way of participation in the costs of her defence; . . .'

'(I have italicized the decision confirming jurisdiction.)'

"There can be no doubt as to the meaning. This clause was an integral and operative part of the dispositive. Read with the following clause, it was an unequivocal decision by the Tribunal confirming its jurisdiction to render judgment based, not on the provisions of Article II, paragraph 5, but on abuse of rights, a very different matter.

"The use of the present tense, '*is* competent', places the construction beyond doubt. The words cannot possibly be construed as meaning: 'Declares that it *was* competent.' The tentative finding on competence was part of the expositive, and it must give way to the decisive clause which appears in the dispositive. The decision by which the Tribunal actually confirmed its decision, the decision which was challenged by Unesco, and the decision which must be taken into account in answering the Questions in the Request, is the actual decision which is contained in the dispositive and not the tentative finding on competence.

"My fourth difficulty relates to the interpretation of Question I of the Request. In putting the question of jurisdiction to the Court, Unesco used the expression 'Was the Administrative Tribunal competent . . . to hear the complaints . . .'. The words used suggest that Unesco wanted the Court's Opinion as to the Tribunal's competence *to hear the complaints* in the widest sense. The expression 'to hear the complaints', if given the ordinary and natural meaning of the words used, would extend to both the reception and the disposition of the complaints. But the French text, which is the original, is, perhaps, less free from doubt in this regard.

"Accordingly, it becomes necessary to consider the attendant circumstances, and to resort to liberal interpretation. In this way the true position emerges.

"In the first place, the Question should be considered in relation to the scope of Article XII, under which it was put to the Court; and also in relation to the scope of the clauses in the Judgments confirming competence. Both the former and the latter extended to both the reception and the disposition of complaints. It would not be unreasonable to interpret the question as extending to the whole field of competence, as included within the Judgments and the Article.

"In the second place, Unesco has throughout made it clear that it was intended to raise the question of jurisdiction in the widest sense. This was done in paragraph 93 of the Written Statement, and reasserted in the letter from the Legal Adviser to the Registrar of the Court, dated June 20th of this year.

"In the Written Statements, not only Unesco but also the Governments have discussed the issues on the assumption that the issue of competence, in the widest sense, was raised by the Questions. The only doubt arises from some remarks by Unesco, both in paragraph 93 of the Written Statement and in the letter of June 20th. It was there suggested that the issue of competence in one aspect (competence to entertain the complaints) was being raised by Question I, and that competence in its other aspect (competence to dispose of the complaints) was covered by Question II.

" To me the question whether the issue of competence to deliver judgments on matters over which jurisdiction had not been conferred by the Statute should be regarded as arising under Question I or II is a matter of slight importance. The important thing is that the issue has arisen, and must be dealt with.

" In my opinion, the proper course to be followed would be to revise the Questions by striking out Question II, and by giving to Question I a liberal interpretation, so as to cover both the reception and the disposition of the complaints. That is the course which the Permanent Court, and also this Court, invariably followed, when there was possible discrepancy between the Questions as framed and the actual legal questions as developed by the Written and Oral Proceedings.

" Examination of these four matters has led me to the following conclusions:

" 1st. That Article XII contemplates a decision by the Tribunal confirming its jurisdiction in its entirety.

" 2nd. That the clauses in the Judgments confirming competence must be construed as confirmation based on the actual position as established in the proceedings, and as confirming the competence of the Tribunal to deliver the Judgments of which they are parts.

" 3rd. That Question I of the Request should be construed as raising the issue of competence of the Tribunal to deliver the judgment.

" Accordingly, I am unable to confine my examination of the case to the seven clauses which come under the heading ' ON COMPETENCE ', but find it necessary to look at the whole judgment. In so doing, I shall not consider whether the Tribunal was right or wrong in any conclusions which it reached concerning the merits. I shall not consider whether there was or was not, in fact, or law, non-observance of the terms of appointment or of provisions of the Staff Regulations; or whether there was or was not, in fact or in law, an abuse of rights. I shall confine myself to the single question: did the Tribunal keep within the limits of its competence, as prescribed by the law and by the Statute? I shall begin with the limitations on the competence of the Tribunal, and then examine the course actually followed in delivering the Judgments and end with my own opinion as to the answers that should be given to the questions.

" As regards limitations, I shall begin with two which were imposed by the Statute.

" By Article II, paragraph 5, the competence of the Tribunal was restricted to hearing ' complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations . . .'.

" There are three possible constructions to be placed on these words. The first, based on literal interpretation, is that the Tribunal is competent to entertain a complaint, provided that there has been an allegation of non-observance of the terms and provisions, and notwithstanding that there is no substantial basis for the allegation.

" If this construction is accepted, the inevitable conclusion is that the Tribunal was without jurisdiction; because the complainants made no such allegation. They did not allege non-observance of the terms of appointment, or of provisions of the regulations. They put their cases on an entirely different basis, which was described by the Tribunal in the following words:

> 'Having had referred to it a complaint submitted against the United Nations Educational, Scientific and Cultural Organisation of 5 February 1955 by Mr. Peter Duberg, an official of that Organisation, asking that the Tribunal be pleased to rescind the decision taken by the Director-General on 13 August 1954 and to enjoin the Director-General to renew the contract of the complainant and to pay him the sum of one franc in respect of damages and legal costs; '.

There is nothing there about non-observance.

" However, I am unable to accept this literal construction, for the same reasons that led to the universal rejection of a similar construction of ' challenges ', in Article XII.

" The second possible construction is neither literal nor liberal. It is that, to sustain jurisdiction, the complainant must make out a *prima facie* case, but need not prove that the case is, in reality, based on non-observance within the meaning of Article II, paragraph 5. That course has its proper place when an objection is taken to the jurisdiction in preliminary proceedings. But then, the decision of the Tribunal is interlocutory, and subject to reversal, as regards competence when, in dealing with the merits, the Tribunal finds that the actual cause of action is not based on ' non-observance '.

" I am unable to accept this construction. There is nothing in the words used to justify its adoption. I do not think that the authors of the Statute intended that the Tribunal should be competent to entertain a complaint, based on a *prima facie* case of ' non-observance '; and that, after that *prima facie* case had been disproved or abandoned, it would be competent to proceed to deal with different causes of action which they had attempted to exclude from the jurisdiction of the Tribunal by the terms of Article II, paragraph 5. I am of the opinion that it must be established that the cause of action is based on ' non-observance ' before the Tribunal can be regarded as competent to render judgment. It is noteworthy that there is not even a tentative finding of ' non-observance ' in the expositive and that it was abandoned in the dispositive.

" The second limitation was imposed by Article VIII; and I do not need to repeat what I have said with regard to it. The Tribunal's competence in regard to the contents of its judgment was subject to the most stringent limitation. It could not award damages, punitive or otherwise, it could not impose fines or imprisonment or order equitable reparation; it could only grant the redress for which Article VIII made express provision: rescission, specific performance or competence to ' award compensation for the injury caused '.

" The third limitation is imposed by positive law. It is a general principle of law, recognized in national legal systems and by international jurisprudence, that a tribunal must base its decision on the legal rights of the parties. In the absence of a special provision in its statute, a tribunal is not competent to base its judgment *ex aequo et bono*.

" Keeping these limitations in mind, it is necessary to look at the course actually followed by the Tribunal in dealing with the cases. In so far as the Judgments appeared to be dealing with the question of non-observance of the terms and provisions, I shall refrain from comment, as I am concurring generally with the views expressed by President Hackworth and Vice-President Badawi. But, after touching lightly on these matters, the Tribunal was not content to rely on the grounds set forth in the Statute. It proceeded to base its judgment on an entirely different cause of action: ' *détournement* *de pouvoir* ' and ' abuse of rights '.[1] I do not need to discuss the propriety of attempting, without statutory authority, to introduce these notions into international administrative law. It is sufficient to point out that the adjudication of a cause of action based on them was beyond the competence of the Tribunal under Article II, paragraph 5, of the Statute. Further, they were not merely beyond the scope of this paragraph. They were completely inconsistent with ' *non-observance* '. Both notions were based on the assumption that the Director-General was *observing* the terms of appointment and the provisions of the Staff Regulations, and exercising the legal rights of the Organization, but that he was exercising the rights unconscionably, or for motives different from those which the framers of the Regulations had in mind.

" Further, in dealing with the problem of redress, the Tribunal proceeded in disregard of the limits on its competence imposed by the Statute, and by positive law. It abandoned the idea of awarding compensation in pursuance of the provisions of Article VIII, and decided to award ' equitable reparation ', a course which was precluded by the Statute. It abandoned legal considerations, and decided ' That redress will be ensured *ex aequo et bono* by the granting to the complainant of the sum set forth below;'.

" Finally, when it came to the dispositive, the Tribunal jettisoned the entire cause of action in so far as it was based on ' non-observance ', and relied solely on the cause of action based on ' abuse of rights '. The dispositive began with the provision: ' Rejecting any wider or contrary conclusions '. Assuming that this provision has any meaning at all, it must mean that the Tribunal was rejecting the contrary conclusions, i.e. the complainant's objection dealt with in section ' D ' under the heading ' ON THE SUBSTANCE ' and the respondent's contentions; and also the wider conclusions i.e. contentions based on any ground other than abuse of rights, such as a claim based on ' non-observance '.

" But even if the first provision, quoted above, has no meaning, the matter is put beyond all doubt by the central operative clause of the dispositive, which reads:

> ' Orders the decision taken to be rescinded and declares in law that it constitutes an abuse of rights causing prejudice to the complainant; '.

The words used in this, the crucial clause of the dispositive, leave no room for doubt that the Tribunal had abandoned the complaint, in so far as it was based on any consideration other than abuse of rights.

" Before leaving the dispositive, it is necessary to refer to the declaration which immediately precedes this clause:

> ' Declares that it is competent; '.

It is unnecessary to repeat the comments already made with regard to this declaration. It is sufficient to point out that the actual decision confirming jurisdiction challenged by the Executive Board of Unesco and presented to this Court for consideration was a declaration by the Tribunal that it was competent to render a judgment based, not on non-observance of the terms of appointment of officials and of provisions of the Staff Regulations, but on abuse of rights, a matter which was plainly beyond the competence of the Tribunal as established by the provisions of its Statute.

" It has been suggested that the foregoing considerations are part of the merits, and not relevant to the competence of the Tribunal. But I am unable to accept this view because it does not take full account of what really happened when the four Judgments were rendered.

" Before there had been a position, under the Constitution, the Staff

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[1] The expression " *détournement de pouvoir* ", in the unofficial translation furnished to the Court by Unesco, has been mistranslated as " wrongful exercise of powers ". While, ordinarily, it has been used as the equivalent, in public law, of the notion of abuse of right in private law, the four Judgments treat them as synonymous and interchangeable terms.

Regulations and Rules, and the Statute of the Administrative Tribunal, in which there was an orderly distribution of authority and functions among the Organs of Unesco as regards staff matters. Sovereign power was reserved to the Member States, but, subject to this reservation, general and paramount power was given to the General Conference and, to a more limited extent, to the Executive Board.

" By recognizing the jurisdiction of the Administrative Tribunal of the International Labour Organisation, a field was established within which disputes between officials and Unesco were to be dealt with by the Tribunal. But this field, while broad and extensive, was strictly limited. The Tribunal could not go beyond ' non-observance . . . of the terms of appointment of officials and of provisions of the Staff Regulations . . .', and there was no authority to disregard the legal rights of either officials or Organization.

" The Director-General, under the Constitution, was ' the chief Administrative officer of the Organization '. The Constitution was based on the principle of separation of the powers, and his task was simply to give effect to the common will of Unesco, as expressed by the General Conference and Executive Board. That common will, as regards staff matters, was largely embodied in the Regulations and Rules, in which some discretionary powers were conferred on the Director-General. The General Conference did not choose to submit these discretionary matters to judicial review, but retained them within its own authority. They were matters in which the exercise, by the Director-General, of his discretionary powers was neither absolute nor arbitrary, but subject to control through the political organs, the General Conference and the Executive Board.

" Henceforth, and as a result of the four Judgments, the orderly distribution of authority and functions among the Organs—as established under the Constitution, the Regulations and the Statute—has been destroyed. By its assertion of competence to proceed *ex aequo et bono*, the subjective appreciation of the Tribunal has been substituted for the rule of law in deciding disputes between officials and Organization. By asserting its competence to base its judgments on abuse of rights, the Tribunal has substituted its own notions of ' the good of the service ' and ' the interest of the Organisation ' for the control by the General Conference and Executive Board over the exercise by the Director-General of discretionary powers conferred on him by the General Conference.

" In my opinion the bringing about of such a revolutionary change went far beyond the disposition of the cases on the merits, and transcended the competence conferred on the Tribunal by the provisions of Article II, paragraph 5, of its Statute.

" Having dealt with the limitations imposed on the competence of the Tribunal, and the course actually followed in delivering judgment, it is necessary for me to give my own opinion as to the answers that ought to be given to the Questions set forth in the Request.

" I have interpreted Question I as raising the issue of the competence of the Tribunal to deliver the Judgments, as well as its competence to deal with the less important parts of the hearing. Accordingly, my answer is in the negative.

" The problem of dealing with Question II does not arise for me. But if Question I is not interpreted as raising the issue of the competence of the Tribunal to deliver the Judgments, it follows that this issue would be raised by Question II. In that event my answer to Question II, clauses (*a*) and (*b*), would be in the negative.

" My answer to Question III is that the decisions given by the Administrative Tribunal are invalid, by reason of lack of jurisdiction under the Statute."

Judge Cordova delivered the following Dissenting Opinion:

" The Executive Board of the United Nations Educational, Scientific and Cultural Organization, relying on Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation, has requested an Advisory Opinion of the Court with regard to the competence of that Tribunal to hear the complaints introduced by Messrs. Duberg and Leff and Mrs. Wilcox and Mrs. Bernstein.

" Had I not been firmly convinced that the Court should have refused to comply with the Request of Unesco because of its lack of competence to render an advisory opinion in circumstances such as those underlying the present case, I would certainly have concurred in the Opinion of the Court on the merits, and would have expressed my opinion in favour of the competence of the Administrative Tribunal to hear and adjudicate upon the complaints referred to above.

" The decision of the Court with regard to its competence in this case will have far-reaching consequences. For the first time the Court has had occasion to define its own legal position in connexion with the attempt to transform it into a Court of Appeal in cases tried by the Administrative Tribunal of the International Labour Organisation and by that of the United Nations. Although the present case relates only to decisions of the first of these Tribunals, the two situations, save for slight differences, are very similar.

" The General Assembly, in Resolution 957 (X) of November 8th of last year, adopted an amendment to the Statute of the United Nations Administrative Tribunal introducing a new Article 11 which sets forth grounds for review by the International Court of Justice of the decisions of the said Tribunal which reproduce those set forth in Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation.

" Both Articles, 11 and XII respectively, confer jurisdiction on the Court to review the Administrative Tribunal's decisions by means of Advisory Opinions, in cases in which the jurisdiction of the Tribunal is challenged, or when it is alleged that the Tribunal has made a fundamental fault in the procedure followed. With regard to those two grounds the two Statutes are almost identical. The new Article 11 of the Statute of the United Nations Tribunal also includes, as an additional ground for the intervention of this Court, an error committed by the Administrative Tribunal on a question of law relating to the provisions of the Charter. There is a further difference which is worth noting: Article XII of the Statute of the International Labour Organisation's Tribunal does not give to the individuals the right to appeal to the Court, while Article 11 of the United Nations Tribunal expressly mentions the ' person concerned ' as a possible applicant for an Advisory Opinion. We find the greatest deviation from the wording of Article XII of the Statute of the International Labour Organisation's Tribunal in Article 11 of the Statute of the United Nations Tribunal where it introduces two special innovations: first, the creation of a Special Committee to act as a screen for applications by individual members of the staff, Member States or the Secretary-General asking that the Court should be requested to review a decision of the Administrative Tribunal; second, the provision that the Advisory Opinion of the Court is not binding on the United Nations Administrative Tribunal, although it will be binding on the parties if the Tribunal so decides. These main differences and other minor ones are not, I think, of such a nature as to change the issue which both Statutes put before the Court.

" The legal and practical problem which both amendments tried to resolve was the possibility for the International Court of Justice of becoming a judicial body reviewing the decisions of the two Administrative Tribunals in certain and specified cases. In giving its opinion in this case the Court has also, to a certain extent, given its views on its own jurisdiction as an appellate Court with regard to decisions of the Administrative Tribunal of the United Nations.

" There are several arguments which have convinced me that the Court lacks jurisdiction to act in such a capacity in cases in which the parties are an international organization on the one hand (Unesco in the present case) and staff members on the other. These arguments relate to two different sets of ideas. Firstly, the jurisdiction of the Court derives entirely and exclusively from its Statute, and no other international instrument, including the Statutes of Administrative Tribunals or the resolutions of any Organ of the United Nations, can introduce any modification with regard to the jurisdiction of the Court; they cannot, in particular, either enlarge or diminish the competence of the Court, as defined by the Statute, with regard to its two legal activities, the judicial and the advisory functions. Secondly, the present Request for an Advisory Opinion, in fact, is designed to bring before the Court, in second instance, a contentious case between Unesco and several of its officials, a situation which falls, I believe, outside the competence of the Court.

" It might serve a useful purpose to remember at this point the circumstances in which the present Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation and Article 11 of the United Nations Tribunal were introduced.

" At its last Session, the Assembly of the League of Nations decided not to comply with certain judgments of the Administrative Tribunal rendered in 1946. It was then thought that it would be wise to introduce in the Statute the possibility to ' re-consider ' the decisions of the Administrative Tribunal, denying them the automatic binding effect which they had, and setting up a '*Court of Appeal*' to pass final judgments. '*Court of Appeal*': those were the very words used by the Chairman of the Governing Body of the International Labour Organisation in referring to the possibility for the International Court of playing the rôle of a second instance tribunal (Memorandum submitted by the International Labour Organisation to the International Court of Justice, I.C.J., *Pleadings, United Nations Administrative Tribunal*, p. 71). In a parallel manner, only last year, the United Nations set up a Special Committee on the ' Judicial Review of the Judgments of the Administrative Tribunal of the United Nations ', in accordance with a previous Resolution of the General Assembly (888 (IX) of December 17th, 1954). The work of this Special Committee led to the introduction of the present Article 11 in the Statute of the Administrative Tribunal of the United Nations.

" The framers of the two amendments could not fail to recognize that the cases tried by the Administrative Tribunals were true litigations which had been brought before these judicial bodies to be decided by them, and that their decisions would be binding on the parties concerned; they also realized that before the Administrative Tribunals, the Parties were, on the one hand the international organization and, on the other, the private individuals, members of the staffs; and they must also have been conscious that Article 34 of the Statute of the Court—the very first Article of Chapter II dealing with the ' Competence of the Court '—expressly lays down that '*Only States may be parties in cases before the Court*'. In their desire, nevertheless, to enlist the services of the highest judicial authority of the United Nations to act as a Court of Appeal, the authors of both amendments resorted to the procedure of Advisory Opinions, thinking that, by introducing in their respective Statutes the provision that the Advisory Opinion should be binding upon the parties, they could avoid the difficulty of Article 34 of the Statute of the Court.

" This historical background, the plain words used, and the spirit of the amendments are enough to show that their authors decided, by themselves and for themselves, that, in certain instances, the International Court of Justice should act as Court of Appeal. It is hardly necessary to comment upon the capacity or the right of the International Labour Organisation—or as far as that is concerned, of the Assembly of the United Nations—to impose upon the International Court of Justice obligations and new functions which are not provided for in its Statute or in the Charter.

" The International Court of Justice is incompetent, both *ratione personae* and *ratione materiae*, to play the rôle of a Court of Appeal with regard to cases tried in first instance by the Administrative Tribunals.

" In order to achieve their aims, the framers of Articles XII of the Statute of the International Labour Organisation's Tribunal and 11 of that of the Tribunal of the United Nations made a confusion between the two main functions of this Court.

" None of the Articles of the Statute expressly states that the Court has two functions. Article 68 is the only one which, though in an incidental way, distinguishes between the judicial functions and the advisory functions of the Court as being different in nature. It reads:

> ' In the exercise of its *advisory functions*, the Court shall further be guided by the provisions of the present Statute which apply in *contentious cases* . . .'

Of all the other articles of the Statute, some refer to the judicial and some to the advisory functions of the Court but without drawing a precise distinction. It is not difficult, nevertheless, to detect the different juridical nature of the two main activities of the Court. The Statute of the Permanent Court of International Justice, upon which the present Statute is based, whenever it used the word ' case ', meant a contentious dispute; advisory opinions were requested upon ' legal questions '. The present Statute kept this terminology and thus we see that all articles dealing with the competence and compulsory jurisdiction of the Court, from Article 34 to Article 38, refer only to ' cases ' without any other qualification, but they all refer to contentious disputes exclusively. The Rules of both the Permanent Court and this Court likewise refer only to ' cases ' in all the articles included under ' Heading II: Contentious Proceedings '.

" The judicial activity of the Court deals only with contentious disputes between parties. These are the ' contentious cases ' to which Article 68 refers. The resolution of the Court in cases, contentious in their nature, is a decision, a judgment establishing the rights of the parties with binding force. The resolution, the decision or, properly stated, the judgment rendered by the Court in such cases is binding upon the parties. A very different situation appears with regard to the advisory function of the Court. This is only discharged when there is no contention for the Court to decide; where there are no parties in the proper juridical sense of the word. The Organ or the Specialized Agency seeking an opinion of this kind does not wish, in principle, to be bound by it. They are merely seeking juridical advice from the Court on a legal question.

" The difference between the judicial and the advisory functions of the Court lies in the fact that, in the first of these, there are two or more parties which submit a dispute to the Court, to its authority to impose upon them the law, while in the second, there is no dispute, no parties, and no compulsory jurisdiction to decide upon rights and duties in conflict, even though the body seeking the advisory opinion may be willing to accept and be guided by it.

" There is also a very important difference as regards the parties which may appear before the Court in each of the two aforementioned functions. The Statute makes a very clear distinction between those entitled to come before the Court seeking a judgment and those allowed to request advice. This great difference should be borne in mind in order to understand why the present Request for an Advisory Opinion should have been declined.

" Article 65 of the Statute provides that the Court may give an Advisory Opinion at the request of ' whatever body may be authorized by or in accordance with the Charter of the United Nations '. In turn, Article 96 of the Charter directly provides that the General Assembly and the Security Council may request such Advisory Opinions and, indirectly, if so authorized by the General Assembly, that ' other organs of the United Nations and the Specialized Agencies ' may also request such Advisory Opinions. Therefore, according to the Statute, only the General Assembly, the Security Council, other organs of the United Nations and the Specialized Agencies may request Advisory Opinions. States and individuals are not allowed to request them. Unesco, being a Specialized Agency and having been granted authorization by the Assembly, may therefore legally ask for an Advisory Opinion, that is to say, for a decision of this Court, as defined above.

" Neither the General Assembly, the Security Council, other organs, Specialized Agencies, nor individuals may ask the Court to render a decision in contentious cases. Articles 34, 35, 36 and 37 of the Statute, which govern the judicial competence of the Court, exclude the legal possibility of their becoming parties in contentious cases before the Court. That is the only way in which the rule laid down by Article 34, paragraph 1, can be understood. It says plainly and clearly:

' *Only States* may be parties in cases before the Court.'

" In its three paragraphs, Article 35 only makes reference to States which may either be or not be parties to the Statute, but they must be States for the Court to be open to them in contentious cases. Article 36, in dealing with the compulsory jurisdiction of the Court, refers to ' States parties to the present Statute '.

" In a word, the contentious jurisdiction, the true judicial function of the Court, covers contentious disputes between States, *only and exclusively*.

" In debarring individuals from coming before the Court as parties to ' a case ', that is, to a contentious litigation, the Statute adopted the theory that individuals are not subjects of international law.

" Attention should be called here to a precedent which seems to be of importance. *The possibility for the International Court of Justice of becoming a Court of Appeal with regard to cases tried by Administrative Tribunals was considered and not accepted by the framers of the Statute.* The Delegates to the United Nations Conference on International Organization at San Francisco had before them a proposal, drafted in almost identical terms and inspired by the same ideas as the amendments contained in Articles XII and 11 of the respective Statutes of the Administrative Tribunals of the International Labour Organisation and of the United Nations.

" At San Francisco the Delegation of Venezuela proposed the insertion of the following paragraphs in Article 34 of the Statute:

' Article 34.—(1) *With the exception of the provisions in paragraph* 2 *of this Article*, only States or Members of the United Nations may be parties in cases before the Court.

(2) *As a Court of Appeal, the Court will have jurisdiction to take cognizance over such cases as are tried under original jurisdiction by international administrative tribunals dependent upon the United Nations when the appeal would be provided in the Statute of such Tribunals.*' (United Nations Conference on International Organization, Documents, Vol. 13, p. 482.)

" Therefore, exactly the same situation as the one which is now envisaged by the Statutes of the Administrative Tribunals was under consideration by the Delegates to the San Francisco Conference. The Venezuelan amendment even refers to the possibility of the Statutes of those Administrative Tribunals providing that the International Court of Justice should have the new function as a Court of Appeal. If the Delegates had wished the International Court to act as the Statute of the Administrative Tribunal now requires, they certainly had the occasion to introduce into the Statute a provision to that effect; but, on the contrary, the amendment to Article 34 proposed by the Delegation of Venezuela was not incorporated in the Statute, thus excluding that legal possibility.

" It is interesting to note that the Delegation of Venezuela, as well as all other Delegations, never thought that such an amendment dealing with the possible jurisdiction of the Court as a Tribunal of Appeal, could have any other place than in the chapter on the contentious competence of the Court and never in connexion with its advisory function.

" When the San Francisco Conference, which drafted and approved the Statute, did not adopt this amendment, it also, in fact, rejected the possibility for individuals or for bodies other than States to become parties in ' cases ' before the Court. The failure of the Venezuelan amendment is sufficient evidence, in my opinion, to show that the Statute completely rejects the possibility for the Court to play the part of a Court of Appeal in precisely the same terms in which Unesco has requested the Court to do so in this case. To my mind, this failure of the Venezuelan amendment amounts to an advanced denial and clear rejection of all Requests for Advisory Opinions having the effect of an appeal, presented on the basis of Articles XII and 11 of the respective Statutes of the two Administrative Tribunals.

" After Article 34 and the Venezuelan amendment had been discussed in Committee 4 of the San Francisco Conference, the Chairman, Mr. Gallagher from Peru, summarizing the discussion, stated:

' The principle involved in Article 34 was that States, *but not private individuals or international organizations*, might be parties to cases.' (United Nations Conference on International Organization, Vol. 14, p. 141.)

" From the foregoing, which I believe is the correct and only possible interpretation of the Statute of the Court as a whole, I feel justified in concluding that Unesco could have asked for an Advisory Opinion on an abstract question of law, only if it were seeking advice, an opinion without legal binding force. An Advisory Opinion could never have been asked from this Court in accordance with Articles 34 and 66 of the Statute when, as in the present instance, the case brought before the Court is a contentious legal difference between two or more parties, and when the Organization brings it before the Court with the intention that it will render—in the guise of an advisory opinion or advice—a true judgment, a real decision binding those parties.

" The confusion made by Articles XII and 11 of the Statute of both Administrative Tribunals between the judicial and advisory functions of the Court in order to transform an Advisory Opinion into a Judgment is an absolute legal impossibility according to the only applicable law: the Statute.

" Nobody questions that what Unesco is trying to obtain from the Court is not an opinion or advice but a binding decision, a judgment. The very words of the Statute of the Administrative Tribunal of the International Labour Organisation are the best evidence that what Unesco is seeking is revision, a second instance decision, a final judgment.

" The decision of the Court seems to be predicated on the assumption that Article XII of the Administrative Tribunal's Statute is *res inter alios acta* for the Court, meaning that the Advisory Opinion has nothing to do with the rule laid down by the said Article XII. With regard to the binding force upon the parties before the said Tribunal, this rule, directed solely to the Organization and to the staff members, had nothing to do with the Court itself.

"It should be remembered that the Request itself refers to the Executive Board of Unesco as acting within the framework of Article XII of the Statute in asking for the Advisory Opinion. That is, the Executive Board found the source of its faculty to ask for an Advisory Opinion with binding force with regard to the decision of the Administrative Tribunal precisely in Article XII of the Statute of that judicial body. If the Executive Board had relied only on the authorisation of the General Assembly to ask for such an Advisory Opinion, and had not relied on Article XII of the Statute of the Administrative Tribunal, it could not claim that the Advisory Opinion given by the Court would be binding on the staff members who were parties to the dispute before the Administrative Tribunal. The Advisory Opinion thus obtained by Unesco would be a real Advisory Opinion without binding force. But, by relying on, and purporting to act within, the framework of the Statute, Unesco considers itself justified in imposing the Advisory Opinion on its officials because they accepted the Statute of the Tribunal in signing their contracts of employment. Article XII is the only and the indispensable link between an Advisory Opinion pure and simple and the Advisory Opinion with a supposed effect of a judgment.

"The closest that a Request for an Advisory Opinion may come to a contentious case, without nevertheless changing its nature, may be found in Article 82, paragraph 1, and Article 83 of the Rules of Court.

> '*Article* 82, *para*. 1.—In proceedings in regard to advisory opinions, the Court shall, in addition to the provisions of Article 96 of the Charter and Chapter IV of the Statute, apply the provisions of the Articles which follow. It shall also be guided by the provisions of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable; for this purpose it shall *above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States.*'
>
> '*Article* 83.—If the advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that Article.'

In the circumstances envisaged by these Articles, since the States have not themselves submitted the case to the jurisdiction of the Court, the question is only potentially a contentious case. Nevertheless Article 83 makes it possible for those States to appoint *ad hoc* Judges in compliance with Article 31 of the Statute just as if the question were actually a contentious dispute; *but even then, the Advisory Opinion will not be binding either on the requesting body or on the interested States.*

"The view has also been expressed that Article 34 of the Statute, which deals only with contentious disputes, has nothing to do with the present case, because the Court is not here concerned with a contentious dispute but only with a Request for an Advisory Opinion; that the Court is not concerned with 'parties' in the juridical sense of the word, Unesco being the only one appearing before the Court and that this Court is not obliged and should not try to ascertain what the real purpose of Unesco is in seeking such an Advisory Opinion.

"With this interpretation of the facts and of the legal position of Unesco I cannot agree. I believe that the first obligation of the Court—as of any other judicial body—is to ascertain its own competence and, in order to do that, it has first to determine what is the nature of the case which is brought before it. The present Request, by definition and application of Article XII of the Administrative Tribunal, will be binding on both the Organization and the private individuals, its officials; it may not be considered therefore as anything different from a contentious case. It is impossible to get away from the fact that the officials were necessarily parties in the first instance and they should be so considered in the second instance as well. One cannot think of this case as being of two different natures, a contentious case before the

Administrative Tribunal and not a contentious one when it comes before the Court. When and why should it lose its initial nature? When it comes to the second instance before the Court and just because it is improperly introduced as an Advisory Opinion? The decision of this Court is not only connected with, but absolutely restricted to, the contentious dispute decided by the Administrative Tribunal between the two parties, the Organization and the individuals.

" In the Court's Advisory Opinion of July 13th, 1954, on the ' Effect of Awards of Compensation made by the United Nations Administrative Tribunal ', we find the following passage:

> ' If he terminates (the Secretary-General) the contract of service without the assent of the staff member and this action results in a dispute which is referred to the Administrative Tribunal, *the parties to this dispute* before the Tribunal, *the staff member concerned and the United Nations Organization*, represented by the Secretary-General, will become bound by the judgment of the Tribunal.'

Therefore the parties in a dispute decided by an Administrative Tribunal are the Organization itself and the staff member who brought the action before the Tribunal. This, of course, necessarily means that, should there be a second instance, the parties must be the same before the reviewing tribunal, in our case, before the Court. That is the essence of an appeal, the essence of a second instance, the essence of a revision of a decision of a lower court. The decision of the International Court of Justice to which I have just referred was given in a case where the Statute of the Administrative Tribunal of the United Nations did not provide for an appeal to the Court but laid down that its Judgments should ' be final and without appeal '. But when the Statute provides for the possibility of an appeal, may the Court say that the parties in this appeal do not exist or are not the same as the ones which argued the case in first instance before the Administrative Tribunal? There is no way out: the parties remain the same, they have to be the same or the decision of the Court would not and could not be binding upon them.

" Article XII of the Statute, the application of which Unesco is seeking, states: ' 2. The Opinion given by the Court shall be binding.' Upon whom? Upon the Organization only? That is not the intention of the framers of Article XII. What is wanted is to have the Advisory Opinion of the Court binding upon both the Organization and the staff member. This effect can never be juridically attained unless the staff member is considered as a party in the second instance. Since the Statute prevents individuals and international organizations, that is to say, Unesco and its officials, from bringing their disputes before the Court and since the present case is undoubtedly a contentious one, the inescapable legal conclusion follows that the Court has no competence *ratione personae* to entertain and give a decision in the present case.

" Neither has the Court competence *ratione materiae* to deal with this kind of dispute.

" This other aspect of the incompetence of the Court also flows from the Statute. It relates to the nature of the litigation and of the law which the Court has been called upon to apply.

" Article 14 of the Covenant of the League of Nations, which was the origin of the Permanent Court of International Justice and therefore of this International Court of Justice, stated:

> ' The Court shall be competent to hear and determine any *dispute of an international character* which the parties thereto submit to it.'

" These words are the basis of all judicial activities of the Permanent Court of International Justice and therefore of the International Court of Justice. I do not think that anybody can contend that a dispute between an international organization and a member of its staff, though a contentious case, is an international dispute, in the sense that the Covenant of the League of Nations and the Statutes of the Permanent Court of International Justice and of the present Court (Article 34 in both Statutes), refer to international disputes as ' cases '.

" Article 38 of the Statute is thus worded:

> ' The Court, *whose function is to decide in accordance with international law* such disputes as are submitted to it . . .'

" This provision, if correctly interpreted, means that the Court was set up to apply inter-State law only, because only States may submit disputes to the Court.

" There are times when an Arbitration Tribunal or this Court have to deal with municipal law, or any other kind of law and even with private contracts, when they have to take judicial notice of its existence, and perhaps even of its correct interpretation. Such a case was, for instance, the Nottebohm case, and there are many others, especially those involving the wrongful acts of Governments against foreigners, denial of justice, direct or indirect responsibility and the like; but even then, neither this Court nor the Arbitration Tribunals apply municipal law; they only have to judge such cases according to inter-State law. Municipal law, administrative laws and private contracts only concern them incidentally, in the same way as they have to concern themselves with the facts of the case submitted to them.

" Charters of international organizations being, in fact, conventions between States form part, as such, of inter-State law. The Statutes of Administrative Tribunals and the Staff Regulations, all dealing with legal relations between the Organization and private individuals may perhaps be classified as administrative international law; but Article 38 of the Statute, quoted above, does not give to the Court the possibility of applying in contentious cases such administrative international law, because in this kind of judicial controversy brought before the Court, the parties being States, the only international law applicable has to be perforce, inter-State law. International administrative law would have as much reason to be applied by the Court, under Article 38 of its Statute, as international criminal law, that is to say the Statute and the Principles of the Nuremberg Tribunal. International administrative law and international criminal law may form part of a wider concept of the law of nations, but they certainly concern the relations between a State and individuals and therefore they have no room within the interpretation of the words ' international law ' as used in Article 38 of the Statute of the Court. Once having decided to comply with the Request, the Court had to apply the Statute of the Administrative Tribunal, the Staff Regulations and the contract between the parties, Unesco and the individual officials concerned, that is to say, it had to apply ' International Administrative Law '.

" The incompetence of the Court *ratione materiae*, I believe, is thus also well established.

" What have been the extraordinary practical and juridical consequences of the confusion between the judicial and the advisory activities of the Court?

" Being parties, Unesco and the officials were entitled to equal treatment in the administration of justice. They obtained it in the first instance before the Administrative Tribunal, but were they able to enjoy it before the Court as was their right? The inequality of the parties in the present case is evident, owing to the impossibility under the Statute for individuals to come before the Court and therefore the impossibility for the Court to respect one of the most fundamental and time-honoured principles which requires equality of the parties before the law and in the exercise of their rights before tribunals. In an effort to minimize such an inequality, the Court, on March 16th of this year, decided to depart from the normal procedure and dispense with the hearings in this case. This decision was in harmony with last year's Recommendation of the General Assembly in the sense that, in order to maintain the equality between the parties as much as possible, the international organizations, the States and the Secretary-General, when seeking a revision of a decision of the United Nations Tribunal, should not make oral statements.

" With the same idea in mind the Court accepted the very unusual procedure that one of the parties, Unesco, would lay before the Court both, its own arguments and those of the other parties, its opponents, the Unesco officials. Of course, this abnormal procedure, in the sense that it is not in conformity with the norms, only makes more flagrant the existence of such inequality between the parties. Even with regard to the written arguments, the mere fact that the plaintiffs before the Administrative Tribunal in the procedure before the Court had to depend upon the goodwill of their opponents to act as intermediary for the presentation of their views having regard to the unavoidable obstacle of the Statute, the Court, the highest judicial organ of the United Nations, was not in a position to administer justice, in cases like the present one, on the basis of strict equality between the parties.

" It has been said that in this case the inequality of the parties is only apparent because the officials were able to present their views to the Court. This means, in effect, that although there was a recognized legal inequality between the parties, in the sense that they could not both appear on the same footing before the Court, this legal inequality, in fact, did not represent a practical disadvantage for the staff members.

" Even from the practical point of view the inequality existed. The officials could not and may not call upon the Court—as the Organization was entitled to do—to adjudicate in second instance on a decision taken against them; nor were they able to appear to argue the case in oral proceedings before the Court. But even granting, for the sake of argument, that, from the practical viewpoint, there would have been equality between Unesco and the staff members, the fact that the latter are legally precluded from asserting their own rights themselves constitutes a juridical inequality which makes it impossible for the Court to administer justice in strict compliance with the basic principles of justice.

" That the Statute requires legal as well as practical conditions of equality of the parties for the Court to act legally is made abundantly clear from the wording of Article 35, paragraph 2, of its Statute, which provides that the Court shall be open to other States on conditions laid down by the Security Council, provided that '*in no case shall such conditions place the parties in a position of inequality before the Court*'.

" If the Security Council must not place the parties in a position of inequality before the Court, even when the Council itself is not one of these parties, can a Specialized Agency, such as the International Labour Organisation or Unesco, create conditions placing a party, its own opponents, in a position of inequality before the Court?

" There are, of course, instances in which, even in the absence of one of the parties, the Court, or any other tribunal, can render a legal decision. That is the situation envisaged by Article 53 of the Statute, when one of the parties does not appear or fails to defend its case. But this article deals with a case of a judgment by default, with the voluntary absence of one of the parties, and has nothing to do with the legal impossibility to be present and to defend its own cause, a situation with which the Court was confronted in this case.

" Some of the Judges also shared the view that the Court should have declined to give the Advisory Opinion in this case, on the sole ground that the Court cannot administer justice in accordance with the well-established principle of equality of the parties in any judicial procedure. They do not go so far as to say that this inequality being exclusively derived from the Statute, constitutes in fact and in law the incompetence *ratione personae* of the Court. They are reluctant to admit the incompetence of the Court but, nevertheless, they have to rely on the fact that the present Request brings before the Court a contentious case in which the parties, a Specialized Agency and private individuals, are both precluded by the Statute from appearing in a contentious dispute. The inequality of the parties appears both in the first instance as well as in the procedure before the Court. In the first instance, the individual is not entitled to appeal against a decision of the Administrative Tribunal while the other party, Unesco, is entitled to do so. In the second instance, while Unesco may prevent written and oral arguments, the individual has no such legal possibilities. The source of both inequalities is to be found in the Statute alone. The framers of Article XII knew perfectly well that the staff member could never be entitled to ask for an Advisory Opinion or for a decision from the Court, and so they did not even try to give such a right to the staff members. For individuals and international organizations to be parties in a contentious procedure it would be absolutely necessary to change the Statute, the only means of securing equality for them before the Court. This fact necessarily means that the Court, according to the present terms of the Statute, cannot legally act in compliance with the equality principle, which is the same thing as to say that the Court is incompetent or has not the legal possibility in this case to discharge its functions."

International Organization—Specialized Agencies—International Monetary Fund—Articles of Agreement—Regulation of Currency and International Exchange—Recognition of Such Regulation by Other States—International Recognition of Exchange Control Regulations—Article VIII, Section 2 (b), of Articles of Fund—Authoritative Interpretation by the Fund.

SOUTHWESTERN SHIPPING CORPORATION *v.* THE NATIONAL CITY BANK OF NEW YORK.

United States, New York Supreme Court, Special and Trial Term, New York County, Part III.

March 17, 1958.

THE FACTS.—The plaintiff sued to recover $37,222 paid by the defendant to Anlyan in October 1951 pursuant to instructions from the Bank of Italy, Milan, to the defendant. The plaintiff claimed that the money should have been paid to it and not to Anlyan. Certain issues of fact were decided by the jury in favour of the plaintiff, and the New York Supreme Court had now to decide the legal issue in the case.

In September 1951, Garmoja, an Italian entity, made an arrangement with Corti, another Italian entity, under which Garmoja paid approximately 23 million lire to Credito-Lombardo, an Italian bank, for the account of Corti. Corti then instructed Credito-Lombardo to transmit $37,222 to Anlyan in New York, who before that transfer was to assign the dollars to the plaintiff in New York. The plaintiff was to hold the money for Garmoja. Anlyan did assign the dollars to the plaintiff before the transfer to Anlyan, and the plaintiff notified the defendant of the assignment. The defendant promised to pay the sum to the plaintiff but nevertheless paid it to Anlyan.

The defendant pleaded that the arrangement between Garmoja and Corti was an agreement for the purchase and sale of foreign exchange which violated Italian exchange control legislation. The defendant also pleaded that the agreement and the attempted transfer from Anlyan to the plaintiff were unenforceable because they were contrary to the public policy of the United States and the State of New York.

The Court below found that Italian exchange control legislation from 1934 to the date of the trial required that a licence must be obtained from the Italian exchange control authorities for such dealings as those described. A licence had not been obtained, and the arrangement and attempted assignment were illegal, void, and unenforceable in Italy.

The plaintiff argued that its case was predicated not on the Garmoja-Corti agreement or the Anlyan-plaintiff assignment, but on its independent contract with the defendant, the National City Bank. The plaintiff relied on a principle that a bargain collaterally and remotely connected with an illegal purpose or act is not rendered illegal thereby if proof of the bargain can be made without relying upon the illegal transaction.

Held: that, on the law, the jury's verdict in favour of the plaintiff must be set aside, and the defendant's motion for a directed verdict granted. Either there was no proof at all of the alleged independent contract between the plaintiff and the defendant or the only proof necessarily involved the preceding illegal arrangements. That illegality was fatal to the plaintiff's case because of the Articles of Agreement of the International Monetary Fund, to which both the United States and Italy belong, and also because of the rule of New York law that the Courts will not help a party to an illegal contract to carry out his illegal object.

The Court said: ". . . With these established facts in mind, our courts, under the Bretton Woods Agreement, are expressly prohibited from furnishing any assistance to the enforcement of any agreements made in violation of the Foreign Exchange Control Laws of Italy. Article VIII, section 2(b) of the Bretton Woods Agreement provides as follows:

> " '2(b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.'

" The Board of Directors of the International Monetary Fund on August 18, 1949, issued an interpretation of the above quoted Article VIII section 2(b) of the Bretton Woods Agreement which provides in material part as follows:

" ' The meaning and effect of this provision are as follows:

" ' 1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example, by decreeing performance of the contracts or by awarding damages for their non-performance.

" ' 2. By accepting the Fund Agreement, members have undertaken to make the principle mentioned above effectively part of their national law. This applies to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, section 2.

" ' An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (ordre public) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.'

" And the Board of Directors of the Fund have by letter dated August 8, 1957, addressed to the Secretary of the Treasury of the United States (Defendant's Ex. V in evidence), determined that the six Italian Decree Laws upon which Dr. Rava based his opinion have since Italy joined the Fund on March 27, 1947, and particularly during the year 1951, been maintained and imposed consistently with the Bretton Woods Agreement.

" Both the United States and Italy are parties to the Articles of Agreement of the International Monetary Fund (Bretton Woods Agreement), effective December 27, 1945. This Agreement was accepted by the United States on December 20, 1945, and by Italy on March 27, 1947.

" Even in the absence of the Bretton Woods Agreement, I must conclude that the cited authorities are determinative of the legal issue presented and that plaintiff cannot recover, as a matter of law, in a case such as this, if, as part of its case, plaintiff is required to allege and prove an unlawful act. The rule is succinctly stated in *Stone* v. *Freeman*, 298 N.Y. 268, 82 N.E.2d 571, 572, 8 A.L.R. 2d 304, where the Court of Appeal said:

" ' It is the settled law of this State (and probably every other State) that a party to an illegal contract cannot ask a court of law to help him carry out his illegal object, nor can such a person plead or prove in any court a case in which he, as a basis for his claim, must show forth his illegal purpose . . .'

" In *Restatement of Contracts*, section 597, and comment b thereunder, it is stated that:

" ' A bargain collaterally and remotely connected with an illegal purpose or act is not rendered illegal thereby if proof of the bargain can be made without relying upon the illegal transaction.

. . . . .

" ' b. Even though a plaintiff's case can be made out without indicating anything unlawful, it may be shown that the bargain is illegal because of facts not brought out in the plaintiff's case, provided that the facts so offered show a close enough connection with an illegal transaction. The line of proximity varies somewhat according to the gravity of the evil apprehended. If the evil is serious a more remote connection with the illegal purpose or act is sufficient to invalidate the bargain than if the evil is slight.'

" To the same effect see *Williston on Contracts*, vol. 6, section 1753; *Corbin on Contracts*, vol. 6, section 1531; and *Wood* v. *Hill No.* 2, First Dept., 1925, 214 App. Div. 417, 212 N.Y.S. 550.

" In view of all the foregoing, I am of the ultimate conclusion that the Garmoja-Corti agreement and the assignment are contrary to the exchange laws and control regulations of Italy, and as such . . . illegal and void.

" It is manifest, therefore, that the instant case falls squarely within the ambit of the stated rules, for plaintiff, as agent for Garmoja, is not only seeking the aid of this court to an objective which is illegal under the Italian Law, but plaintiff has also pleaded and proved as a basis for its claim the illegal Garmoja-Corti agreement, the payment of Garmoja thereunder, and the illegal assignment by Anlyan to plaintiff . . ."

[Report: 173 N.Y.S. 2d 509. Affirmed by Appellate Division, First Department, October 21, 1958: 178 N.Y.S. 2d 1019.]

NOTE.—One of the issues raised in this case was whether, under the Articles of Agreement of the International Monetary Fund, the courts of one member country of the Fund must recognize exchange control regulations in force in another member country. Article VIII, Section 2(b), of the Articles, which has been the subject of the authoritative interpretation by the Executive Directors of the Fund to which reference is made by the Court, creates an international obligation of this character in certain defined circumstances. To the extent that it does this, it has changed the law in many member countries. The Court based its decision on the provision in the Articles. The law on this subject is discussed in the cases reported in *International Law Reports*, 1955, pp. 713–32. The *Southwestern* case is discussed in International Monetary Fund *Staff Papers*, vol. VI (1957–58), pp. 471–74.

D—OTHER INTERNATIONAL ORGANIZATIONS AND ORGANS OF INTERNATIONAL ADMINISTRATION

International Organization—Organs of International Administration—International Postal Conventions of Rome, 1906, and Madrid, 1920—Payment between Postal Administrations—" Contrary Arrangements "—Need for Precise Notice of Cancellation of Such Arrangements—Need for Regulations Governing Arrangements.

Re SEA TRANSIT CHARGES

(POSTAL ADMINISTRATION OF THE NETHERLANDS *v.* POSTAL ADMINISTRATION OF THE UNITED STATES OF AMERICA.)

Postal Administrations of Switzerland and Canada, Arbitrators. 1945.

THE FACTS.—This was a dispute between two Postal Administrations on the subject of the cost of sea transit on the mails carried by the Royal Dutch West India Mail Line between 1920 and 1923 and by the Holland America Line in 1922 and 1923. The dispute was submitted to arbitration, the Postal Administrations of Switzerland and Canada being chosen as arbitrators, the former by the Postal Administration of the Netherlands, the latter by the Postal Administration of the United States of America.

The question to be decided was whether the transit charges for sea conveyance of the mails despatched from the ports of the United States and carried by the steamers of the Royal Dutch West India Mail Line between January 1, 1920, and December 31, 1923, and by the Holland America Line between January 1, 1922, and December 31, 1923, were to be paid in a lump sum reckoned on the basis of the provisions of the Universal Postal Convention relative to statistics (" third service " Article 3, para. 2, and Article 4 of the Conventions of Rome and Madrid) or according to the real weight of every mail actually carried (" contrary arrangement " provided for by the aforesaid provisions).

The Dutch Government had in 1904 made a contract with the Royal Dutch West India Mail Line (hereinafter called " RDL ") and in 1909 one with the Holland America Line (hereinafter called " HAL ") for the conveyance of the mails for the exclusive account of the Dutch Government between the United States of America and certain ports on the northern coast of South America on the one hand, and between the United States of America and the Netherlands on the other. These contracts guaranteed a subsidy from the Netherlands Government. These facts were known to the Postal Administration of the United States.

For a long time, and at any rate from January 1, 1914, the charges due for the conveyance of correspondence sent by the United States and taken over by RDL and HAL were reckoned and paid according to the real weight of the mails as agreed by the Administrations of the United States of America and the Netherlands. The two parties admitted that they had not been able to find out exactly when or how this manner of proceeding had been adopted. They likewise admitted that they carried it out without having come to any agreement as to how long they would do so. The payments were made by the Administration of the United States and accepted without observation by the Netherlands Administration and the navigation companies. Some of the payments were made to the Netherlands Administration, others direct to the navigation companies.

By circular of the International Bureau in Berne, dated June 30, 1921, No. 3802/211, the Netherlands Administration sent to the Union Administrations a list of the navigation companies maintained by it and which it placed at the disposal of these Administrations; the services of RDL and HAL figured in the list.

On January 1, 1922, the Universal Postal Convention of Madrid and the Regulations for its execution came into force.

The two contracts of 1904 and 1909 concluded by the Government of the Netherlands with RDL and HAL were replaced by others in August 1922. The new contracts stated that for the conveyance of mails from countries of origin other than the Netherlands the two Navigation Companies had a right to receive the transit charges due to the Netherlands in virtue of the provisions of the Universal Postal Convention. The date for the coming into force of these contracts was fixed retrospectively, *viz.*, January 1, 1920, for RDL and January 1, 1922, for HAL.

On February 18, 1922, the Administration of the United States sent to the Netherlands Administration statements concerning the transit charges, reckoned according to the actual weight, for the mails originating in or sent in transit by the United States and carried by the steamers of RDL and HAL in the years 1920 and 1921. On March 28, 1922, the Administration of the United States also sent to the Netherlands Administration cheques in payment of the accounts relating to these statements.

On August 11, 1922, the Netherlands Administration, referring to the circular of the International Bureau of June 30, 1921, informed the Administration of the United States that RDL and HAL were maintained by the Netherlands Government, that payment for transit charges had to be made to these companies on the basis of the statistics established between May 1 and May 28, 1921, and that the cheques received could not be accepted as definite payment of the transit charges for the years 1920 and 1921.

After further correspondence between the two Administrations, the Netherlands Administration on April 21, 1923, requested the United States Administration to take the actual weight of the mails for the period corresponding to that fixed for the statistics of May

1921 as the basis on which to reckon the annual transit charges. By letters of May 10, 1923, and April 30 and December 3, 1924, the United States Administration replied that it was not disposed to take the statistics of May 1921, prescribed by the Universal Postal Convention, as the basis on which to calculate the transit charges due to RDL and HAL for the years 1920 to 1923.

By a *Compromis* dated July 23, 1934, the parties agreed to submit the question in dispute to arbitration in conformity with the provisions of Article 25, para. 1 (1), of the Universal Postal Convention of Madrid of 1920. The Netherlands Administration claimed, besides the transit charges for the period 1920 to 1923, the sum of 962,562 gold francs.

Held: that the claim must fail except as to 100,000 gold francs. The charges in question had for many years been reckoned and paid on the basis of the actual weight of the mails carried. This was a " contrary arrangement " under the Rome and Madrid Conventions. The Circular of June 30, 1921, did not make it sufficiently clear to the United States Administration that this arrangement was cancelled. On the other hand, the parties had in fact neglected to furnish any satisfactory regulations in substitution for the system prescribed in the Conventions and both parties must therefore bear part of the loss resulting from this neglect.

The Arbitrators said: " The facts in dispute took place under the régime of the Convention of Rome, which came into force on October 1st, 1907, and of the Convention of Madrid that came into force on January 1st, 1922.

" Article 3, § 2 of the Convention of Rome stipulates that in the absence of any contrary arrangement the direct sea conveyance between two countries by means of vessels maintained by one of them is considered as a third service, and that such conveyance is governed by the provisions of art. 4 (Transit rates). This art. 4, § 7, provides that the general liquidation account for transit charges for such conveyance are based on statistics prepared once in every six years during a period of 28 days to be fixed in the Regulations. Article XXXIII, § 1, of these Regulations stipulates that the statistics relating to transit charges shall be prepared alternately during the first 28 days of the months of November or May, and that the statistics of November 1907 shall apply to the years 1908 to 1913 inclusively, those of May 1913 to the years 1914 to 1919 inclusively.

" The wording of art. 3, § 2, of the Convention of Madrid is *identical* with that of art. 3, § 2, of the Convention of Rome and likewise foresees contrary arrangements in the absence of which the provisions of the following article are to be applied. Art. 4, § 8, (transit and warehouse charges) provides that the general liquidation account for these charges is based on statistics prepared once in every three years during a period of 28 days to be fixed in the Regulations. Art. XXXII, § 1, of these Regulations stipulates that the statistics on the basis of which transit charges are reckoned shall be prepared alternatively during the first 28 days of May or during the 28 days that follow the 14th of October. The statistics of May 1921 will apply exceptionally to the years 1920, 1921, 1922 and 1923; the statistics of October-November, 1924, to the years 1924, 1925 and 1926.

" It is consequently clear that the two Conventions of Rome and of Madrid foresee contrary arrangements to the regulation of 'third service' as provided by the Convention.

" The reservation with respect to 'contrary arrangements' was intentionally introduced and retained by the Congresses. It furthermore has in view the arrangements made between contracting parties (Documents of the Congress of Lisbon, vol. II, p. 129/130, 372 to 374; Vienna, p. 693 to 697; Washington, p. 409; Report of the International Bureau 1896, p. 6 and Acts of the UPU, annotated edition, Berne 1940, ad art. 11 of the Convention, note 3, fig. 2, lit. *b*).

" It is evident from . . . the statement of the facts that the charges for the conveyance of the letter mails despatched by the United States of America and taken over by RDL and the HAL had for a long time, and at any rate since January 1st, 1914, been reckoned and paid, as agreed between the United States Administration and the Netherlands Administration, on the basis of the actual weight of the mails. This manner of reckoning and payments was derogatory to the provisions of the Universal Postal Convention concerning the period for preparing the statistics and the payment of the charges resulting from these statistics, but it conformed to the will of the parties and consequently also to the two Conventions of Rome and Madrid, both of which admit, in this respect, the possibility of arrangements contrary to the Convention. As the parties had not fixed the duration of that arrangement it had consequently no fixed term of validity.

" The signature of the Universal Postal Convention of Madrid on November 30th, 1920, the ratification of that Convention by the Government of the United States of America on December 31st, 1921, and the coming into force of that Convention on January 1st, 1922, did not put an end to the arrangement made by the Administrations of the Netherlands, and of the United States of America for calculating the transit charges on the basis of the actual weight of the mails. The wording of art. 3, § 2, of the Convention of Madrid is identical with that of art. 3, § 2, of the Convention of Rome, and both expressly admit the possibility of contrary arrangements. Besides, the Convention of Madrid contains no provision officially annulling the contrary arrangements foreseen in art. 3, § 2, of the Convention of Rome.

" The circular of the International Bureau of June 30th, 1921, by means of which the Netherlands Administration communicated the list of the steamship lines it maintained, was sent to all the Union Administrations in conformity with art. XXXVIII, § 2, ch. 7 of the Regulations for the execution of the Convention of Madrid. This provision had been inserted in the Regulations on the proposal of the French Administration and renewed by the Administration of Great Britain. The motive given was: ' In order to be able to establish the accounts for transit charges or for the compensation for the conveyance of mails by free ships, the Administrations must know what maritime services are subsidised, to what routes the subsidies apply, and also what vessels receive premiums or other allowances which, in respect of the conveyance of correspondence, make them dependent on a Union country '. The new provision was adopted without opposition (Documents of the Congress of Madrid, vol. I., p. 166/167; vol. II, p. 111 and 325.)

" The United States Administration however knew . . . that the RDL and the HAL were subsidised and maintained by the Netherlands Administration. Seeing that this situation had not prevented the conclusion of the special agreement with the Netherlands Administration for the reckoning and payment of transit charges on the basis of the actual weight carried . . . the United States Administration could not be expected to see, in the circular, a special notification to itself that the arrangement that had for so many years existed between the two Administrations was thereby cancelled. If the Netherlands Administration was nevertheless of opinion that the circular, sent to all the Union Administrations, had a special signification for the United States Administration on account of the custom hitherto observed by the two parties, it ought to have informed the United States Administration specially of the fact.

" It was only by its letter of August 11th, 1922, that the Netherlands Administration validly informed the United States Administration that it intended to demand payment of the transit charges on the basis of the statistics prepared according to the provisions of the Convention, and that in so doing it cancelled the old ' contrary arrangement ' applied by the two parties and for which no term of validity had been specified. By this cancelling, the provisions of the Convention, according to which the transit charges are to be reckoned on the basis of statistics, became automatically applicable. The charges established in this way are of the nature of a ' forfait ' (Acts of the UPU, annotated edition, Berne, 1940, note 1 to art. 78 of the Convention, and Doc. of London, 1929, II. p. 238, France).

" The provisions of the Convention of Madrid and its Regulation, referred to [*supra*], stipulate that the accounts relating to the transit charges for the years 1920, 1921, 1922 and 1923 are based on the statistics of May 1921. If the parties have not prepared these statistics, it stands good that the actual weight of the mails conveyed during that period was established by the United States Administration and transmitted by it to the Netherlands Administration which declared itself disposed, in the absence of other data, to accept it as basis on which to reckon the transit charges for the whole of the period affected by the claim. Nevertheless, by reason of the considerations expressed [above] the amount claimed by the Netherlands Administration, which is reckoned for the whole period in dispute, 1920 to 1923, on the basis of statistics, cannot be granted in full but only for the period subsequent to August 11th, 1922. As this period ends on December 31st, 1923, it represents approximately one-third of the period beginning January 1st, 1920, for the mails conveyed by the RDL and two-thirds of that beginning January 1st, 1922, for the mails carried by the HAL."

In fixing the amount of the indemnity, the Arbitrators felt bound to take into account the fact that the parties had neglected, at their risk and peril, to susbtitute satisfactory regulations for the system prescribed by the Convention. Having made the arrangement in times of peace, that is to say, prior to the First World War, with a view to derogating from the rules of the Convention which prescribes statistics, and of adopting a " Contrary Arrangement ", they should at the same time have determined and fixed the different details of that arrangement. They were not only unable to produce any documents that regulated in the least the details of the arrangement, but they had never preconcerted when or how the arrangement should come to an end. They were consequently bound to bear, at least in part, the consequences of the risk they assumed.

The Arbitrators likewise pointed out that the Netherlands Administration had already received payment from the United States Administration for the mails conveyed, and that a too great difference between the actual weights and those based on the statistics must be justly corrected.

On taking into account all the circumstances of the dispute, the Arbitrators fixed *ex aequo et bono* at 100,000 gold francs the amount that the Netherlands Administration could claim from the United States Administration.

[Report: *L'Union Postale* (Monthly Magazine published by the International Bureau of the Universal Postal Union), vol. 71, No. 1 (January 1946), p. 11.]

International Organization—Organs of International Administration—Universal Postal Convention of Brussels, 1952—Payment between Postal Administrations—Payment for Reply Coupons Issued in Wartime Puppet State—The Independent State of Croatia—Payment of Transit Charges from Enemy Occupied Territory—German Occupation of Yugoslavia—Arbitrability of Dispute—Absence of Uncontested Relevant Rule of International Law—Arbitration—Appointment of Arbitrators—Appointment of Arbitrator by Third Party in Default of Appointment by Respondent—Arbitration under Universal Postal Convention of Paris, 1947—Belligerent Occupation—Administrative Functions of Occupant—Postal Administration of Occupant—Clearing of Debts of—State Succession—Succession with Regard to Contractual Obligations—Debts of Wartime Puppet State—Debts of Independent State of Croatia—Refusal by Yugoslavia to Pay.

Re DUES FOR REPLY COUPONS ISSUED IN CROATIA;

Re TRANSIT CHARGE FOR MAILS FROM OCCUPIED YUGOSLAVIA.

(POSTAL ADMINISTRATION OF PORTUGAL *v.* POSTAL ADMINISTRATION OF YUGOSLAVIA.)

Postal Administrations of the Netherlands and Denmark, Arbitrators.
March 17, 1956.

THE FACTS.—This was an arbitration under Article 31 of the Universal Postal Convention of Brussels, 1952. The Portuguese Postal Administration claimed from the Yugoslav Postal Administration (1) 30 gold francs in respect of reply coupons issued in 1943 in the then independent State of Croatia and exchanged in Portugal —a debt which had been acknowledged in 1944 by the Croatian Administration, and (2) 266 gold francs being transit charges for Yugoslav mails in transit through Portugal in 1941. The Yugoslav Administration refused to pay these sums, contending that the existence of the former Croatian State created by the Occupying Power when Yugoslavia was invaded had not yet been recognized by the present Yugoslavia, and that consequently " the actions of the said State under the patronage of the enemy " could in no way commit the Yugoslav Administration. The acknowledgment of the debt by the Croation State had nothing to do with the present Yugoslavia, which in 1944 " was still under the domination of the Occupying Power and on account of that very fact was not able to perform any valid act with a foreign country ". Yugoslavia was therefore " completely disinterested in the assets and liabilities of " the Croatian State. With respect to the 266 gold francs for transit charges, the Yugoslav Administration added: " As my country was invaded by the occupying power in April, 1941, from the 18th April onwards, that is, from the date of its capitulation, it was not able to perform any valid act in relation with a foreign country either in its own name or on its own account. In support of [the refusal to pay] I must inform you further that the same procedure has already been applied towards every other Administration with similar accounts and up to now, no exception had been made in this respect. It is understood that the Portuguese Administration has every right to claim its dues from the occupying countries responsible for the costs after those incurred up to the 18th April, 1941, in our accounts." Moreover, " during that time the international service was not operated " and " consequently [the Yugoslav] Administration does not know what the debts in question were."

The Portuguese Administration contended that the amount owing to Portugal from Yugoslavia was incontestable and the fact that the debtor, at the time when the debt arose, was governed by authorities different from the present ones could not be taken into consideration. Moreover, even if Yugoslavia thought that the ex-State of Croatia was an artificial creation by the Power occupying Yugoslavia during the war, Yugoslavia had never denied that it formed an integral part of Yugoslav territory.

The International Bureau of the Universal Postal Union informed both Administrations involved in the dispute that in its opinion the only means of settling the dispute would consist in resorting to the arbitration provided in Article 31 of the Universal Postal Convention of Brussels.

The Portuguese Administration agreed to the International Bureau's suggestion, and in a letter dated January 28, 1954, to the Bureau stated that it had designated the Netherlands Postal Administration as Arbitrator and that the latter had accepted.

The Yugoslav Administration, on its side, expressed the opinion that this was not a case for arbitration. It developed this point of view in two letters, one dated January 27, 1950, addressed to the Portuguese Administration, the other dated December 30, 1953, to the International Bureau. In the first of these letters, the Yugoslav Administration stated as follows:

" My point of view is not motivated by the fact that my Administration does not have confidence in the arbitration proposed by you or that my Administration wishes to leave the case open and unsolved. On the contrary, my Administration does not wish to leave pending any case in which it is legally concerned which, in this specific instance, is not the case.

" In the first place, Article 12 of the Universal Postal Convention [of Paris, 1947] provides for arbitration only in the case of divergences concerning the interpretation or the application of the Universal Postal Convention and its Agreements, which is not the case here. Here, we have a question of principle falling in the sphere of public international law which cannot be decided on the basis of the Universal Postal Convention or by means of a common arbitrator. Since the occupation, my

Administration was not able to perform any international service, a fact owing to which no commitment could be made with my country during this period.

" My Administration has stated its attitude in principle towards the occupation period not only in the bilateral relations with Administrations but also during international meetings, the last of which took place in Geneva at the Session of the Council of the International Telecommunications Union where your Administration was also represented. My Administration regrets therefore that it cannot accept, even with the best will, the decision proposed by you as this latter is not in harmony with your attitude on the principle of this question regarding the war period."

In its letter of December 30, 1953, the Yugoslav Administration pointed out especially:

" In the case which concerns us and with regard to the transit charges between my Administration and Portugal, there is absolutely no need to resort to arbitration. The amounts due for the corresponding period of transit have been ascertained and confirmed mutually by the acceptance of [the] statements referring to them. The provisions of the Universal Postal Convention in effect at the time of the latest transit statistics were strictly applied to this case and indeed, no dispute, either originally or otherwise, has arisen as to the interpretation of any provision whatsoever of the Convention or of the Detailed Regulations for the execution of the latter.

" According to Article 31 of the Convention concluded at Brussels in 1952 a copy of which was sent to me in support of the proposal for arbitration, it is in fact required that there be ' dissent between two or several Member Countries regarding the interpretation of the Convention and the Agreements as well as their Detailed Regulations, etc.—', while the matter in question here is not of the same character at all and your proposal does not contain any provision covering international commitments the interpretation and application of which may be contested.

" The obligation to pay transit charges for every year in conformity with the explicit provisions to this effect, represents a special right which is exercised through the General Annual Account. Now this right and its exercise can only be contested on the grounds laid down by the very provisions relating to statistics for the period envisaged, and finally,

" The wartime assets of Portugal cannot be cleared on the basis of the provisions for the existing Universal Postal Convention. The commitments of this kind must indeed be settled in accordance with special arrangements concluded between the Governments concerned and only when all the cases and obligations arising from the state of war have been settled. In this specific case, the obligation towards Portugal has been created by the so-called ' Independent Croatian State ', which was only an artificial creation of the occupying power at that time and the existence of which was and can never be recognized by the Government of the [People's Federal Republic] of Yugoslavia. Consequently, what was in the interest of the occupying power was not in that of the occupied people and, on account of this, the Postal Administration of Portugal could, in order to enforce its own rights, take special legal action but this latter can in no way be resolved on the basis of the Universal Postal Convention as this is a question arising out of the war and its consequences which we consider as ' force majeure '. Now the war, as a case of ' force majeure ', provokes, directly or indirectly, damages for those attacked and my Administration, having suffered a large share of these damages, would not in any way like to increase it by paying, in addition, the debts of the occupying power and its collaborators. The debts in question were not created in the interest of Yugoslavia, a country whose people, at the time, were fighting hard for their national liberation."

The International Bureau, in a letter dated February 9, 1954, to the Yugoslav Administration, replied that it could only maintain its point of view, namely, that the only way of settling the dispute was by arbitration. At the same time, the Bureau drew the attention of the Yugoslav Administration to the fact that if it did not designate an arbitrator within the time-limit laid down by the Convention, the Bureau itself would, according to the rules, designate an arbitrator. This time-limit expired on August 2, 1954, that is, six months after the receipt by the Bureau of the Portuguese Administration's request for arbitration.

In view of the failure of the Yugoslav Administration to designate an arbitrator within the above-mentioned time-limit, the International Bureau, by letter of August 7, 1954, appointed as such the Postal Administration of Denmark, which accepted.

Held: (1) that the question of payment for the reply coupons issued in Croatia was proper for arbitration but that of the responsibility of Yugoslavia for the debts of the Croatian Administration or those of the war-time occupation authorities was not such a question. The latter was one for solution on the basis of special clearing agreements or of general rules of public international law.

(2) That the claim of the Portuguese Administration must fail. Yugoslavia could not be regarded as the successor to the debts of the Croation Administration and the German occupation authorities as Yugoslavia had not recognized such a succession and there was no special international agreement or uncontested rule of public international law governing the question.

The Arbitrators said: " The questions which divide the two parties in litigation may be summed up fundamentally in the two following points:

" (1) Does the Portuguese Administration have the right to demand the payment by compensation, of the dues contested by Yugoslavia?

" (2) Is Yugoslavia responsible for the debts contracted by the Croatian Administration or by the authorities which occupied the Yugoslav territory during the last world war?

" *Competence of the arbitrators.*—The dues in dispute have their source in the international postal relations regulated by the provisions of the Universal Postal Convention, signed and ratified by both parties. In order to find the reply to the first of the two litigious questions mentioned above, one only has to apply and interpret the Universal Postal Convention. According to its article 31, if two or more Member-Countries fail to agree as to the responsibility imposed on a postal Administration by the application of the Convention, the question at issue is settled by arbitration.

" The rules of the Convention concerning the request for arbitration and the designation of arbitrators have been strictly observed. Consequently, the constitution of the arbitration is regular and the arbitrators are competent to take cognizance of the question mentioned under (1) above.

" As for the question mentioned under (2) above, it is not within the competence of the postal arbitrators as it must be solved on the basis of special international agreements on the clearing of the consequences of the war or on the basis of general rules of public international law by the organs competent to judge such issues (for example, special arbitral courts, International Court of Justice, Reparations Commissions set up by a peace treaty).

" *Interpretation of the provisions of the Convention.*—The two amounts owing to the Portuguese Administration are incontestable since the said Administration delivered postage stamps in exchange for reply coupons and since it did carry out the transit service in question. The debts resulting from these postal operations, however, were contracted by the Croatian Administration or by the German occupation authorities or by the services depending on the latter; they do not therefore arise from postal operations carried out by the Yugoslav Administration to which the Portuguese Administration applied for the clearing of the accounts.

" The Portuguese Administration considered the mere fact that the territory on which the Croatian Administration and the German occupation authorities operated was an integral part of the present Yugoslavia and that the latter should therefore be held as the rightful successor to authorities who exercised power on the same territory during the last world war to be sufficient grounds for applying to Yugoslavia.

" The settlement of debts through compensation is subject to certain conditions. In particular, the creditor does not have the power to replace the original debtor by another one whom he considers to be the rightful successor *if this successor is not recognized either by the debtor or by the special international agreement or an uncontested rule of public international law.*

" Since in this specific case, this rightful succession is contested by Yugoslavia and that no special international agreement or uncontested rule of public international law recognizes the succession as the instances competent to solve questions of this kind have not yet pronounced a judgment in this respect, a clearing cannot be effected.

" *Award.*—The arbitrators, for the above reasons,

" *declare* that they are competent to decide the questions at issue in so far as they depend on the application and interpretation of the Universal Postal Convention;

" *consider*, on the other hand, that it is not within their competence to settle questions of public international law concerning the responsibility incumbent upon Yugoslavia with regard to the obligations contracted during the war on its territory by the Croatian authorities and the German occupation authorities;

" *decide*, that since the question of the responsibility for the obligations contracted during the war by Croatia and the German occupation authorities on Yugoslav territory has not been settled by the competent instances, the Portuguese Administration has no grounds for demanding the payment of its contested dues (total of 296 gold-francs) through compensation."

[Report: *L'Union Postale* (Monthly Magazine published by the International Bureau of the Universal Postal Union), vol. 81, No. 9 (September 1956), p. 90A.]

International Organization—Organs of International Administration — International Postal Convention — Payment between Postal Administrations—Compensation for Loss of Registered Postal Packet—Sharing of Compensation under Article 44 (1) (3) of Arrangement of Buenos Aires, 1939.

See *Postal Administration of Turkey* v. *Postal Administration of Syria*, decided in 1948 by the International Bureau of the Universal Postal Union as Sole Arbitrator under a *Compromis spécial.* The arbitration related to a postal packet containing jewellery registered with *valeur déclaré* and despatched in 1943 from Switzerland to a firm at an address in Istanbul whence it was at the instance of the firm re-directed to Khartoum, Sudan. The packet was sent in error to Baghdad, whence it was forwarded to Aleppo and thence to Cairo, where it was found on arrival to have been broken open and part of the contents pilfered. The Turkish Administration paid compensation to the sender and now claimed reimbursement from the Syrian Administration. The latter offered to share the amount paid equally with the Turkish Administration. The Administration of Iraq refused to accept responsibility on the basis of the declared value but agreed to pay a part of the compensation corresponding to that applicable to an ordinary parcel.

Held: that in the circumstances of this case the parties were bound by the provisions of Article 44 (1) (3) of the Arrangement of Buenos Aires, 1939, concerning postal packets, which ran as follows:

> " If the loss, theft or damage occurs in course of transit, without it being possible to establish the country on the territory or in the service of which the act was committed, the Administrations concerned must bear the damage in equal shares. This rule applies in particular to global transmission of parcels."

As it appeared that the Egyptian Administration was not concerned, the International Bureau ruled that the three Administrations of Turkey, Syria and Iraq must contribute in equal shares to the repayment of the compensation which had been paid.

[Report: *Rapport de Gestion du Bureau International de l'Union Postale Universelle*, 1948, p. 14.]

International Organization—Constitution of International Organization—Powers of Court of Organization—Power to Declare Illegal Municipal Law of a Member State—Interpretation of Constitutive Treaty—Restrictive Interpretation—Interpretation of Treaty Provision by Reference to Other Provisions of Treaty—Interpretation by Reference to Treaty as a Whole—Interpretation by Reference to Absence of Specific Mention—European Coal and Steel Treaty, 1951—Whether Duty on Coal Constitutes a Special Charge—Necessity to Give Reasons for " Implied Decision " of High Authority.

GROUPEMENT DES INDUSTRIES SIDÉRURGIQUES LUXEMBOURGEOISES *v.* THE HIGH AUTHORITY.

Court of Justice of the European Coal and Steel Community.

(Pilotti, President; Rueff, Riese, Serrarens, Delvaux, Hammes and van Kleffens JJ.)

April 23, 1956.

THE FACTS.—In order to ensure complete freedom of trade within the Community, the Coal and Steel Treaty of April 18, 1951, provided by Article 4 that:

> " The following are recognized to be incompatible with the common market for coal and steel, and are, therefore, abolished and prohibited within the Community in the manner set forth in this Treaty:
>
> " (a) import and export duties, or taxes with an equivalent effect, and quantitative restrictions on the movement of coal and steel;
>
> " (b) measures or practices discriminating among producers, among buyers or among consumers, especially as concerns prices,

delivery terms and transport rates, as well as measures or practices which hamper the buyer in the free choice of his supplier;

" (c) subsidies or State assistance, or special charges imposed by the State, in any form whatsoever;

" (d) restrictive practices tending towards the division or the exploitation of the market."

In accordance with this Article, as soon as the Community came into existence in 1951, Luxembourg removed all import duties upon coal. This was important, because Luxembourg possessed no coal mines herself so that all the coal consumed in the country had to be imported. However, in March 1954, steel manufacturers in Luxembourg were no longer allowed to buy their supplies of coal under direct contracts with foreign producers, but a special *Office Commercial du Ravitaillement* (hereinafter called " the *Office* ") was set up by the Government which was to undertake bulk buying from producers and was itself to retail to consumers the coal that it thus bought. Moreover, by a Decree of the Luxembourg Government, a tax was imposed on coal, other than coal for household purposes only, purchased from this *Office*, which tax had to be remitted to a special *Caisse de Compensation* (hereinafter called " the *Caisse* ").

On July 14, 1954, the plaintiffs requested the High Authority, in exercise of its power under Article 88 of the Treaty, to declare that the duty being placed upon this coal was in fact illegal by the Treaty, and to order the suspension of the activities of the *Office* and the abolition of the *Caisse*, on the grounds (i) that the duty placed upon all coal bought from the *Office* amounted to a " special charge imposed by the State " so that it violated Article 4 (c) of the Treaty, and (ii) that it was a " measure or practice discriminating among buyers or among consumers, especially as concerns prices ", so that it also violated Article 4 (b). The High Authority took no action upon this request until January 1955, when it gave a Decision declaring the establishment of the *Office* to be in violation of the Treaty. The Luxembourg Government therefore abolished it. The Decision of the High Authority, however, made no reference to the *Caisse*, so that it had not been declared illegal; but nevertheless the Luxembourg Government abolished it also, as from April 2, 1955.

By Article 35 of the Treaty it is provided that if the High Authority fails to take a Decision within two months after it has been requested by an enterprise to do so, that failure is deemed to amount to a Decision refusing to take action, and against this implied Decision an appeal may be brought before the Court. By September 14, 1954, therefore, the High Authority not having taken any action, one way or the other, on the plaintiffs' request of July 14, 1954, to order the abolition of the *Caisse*, it was deemed by Article 35 to have taken a Decision refusing to make such an order. The plaintiffs now applied to the Court to have this implied Decision annulled. It was admitted that by the time the action was heard the *Caisse* had been abolished by the Luxembourg Government, but nevertheless, if the Court were to hold that the duty paid to the *Caisse* had been demanded illegally *ab initio*, that duty would become repayable. In the plaintiffs' case this would amount to a repayment of about 28 million Belgian francs.

Before the Court, the plaintiffs adduced the same arguments as they had submitted to the High Authority in July 1954, namely, that the duty upon imported coal violated Article 4 (b) and (c) of the Treaty. They also relied on Article 33 of the Treaty, under which a Decision of the High Authority could be annulled if in passing it the Authority had committed a violation of a substantial procedural requirement. The Court had earlier held that a failure to set out the reason for a Decision amounted to a violation of such a procedural requirement. Now, the Decision against which the plaintiffs were appealing was merely an implied or notional Decision, so that clearly by its very nature it could not set out the reasons on which it was based. The plaintiffs therefore contended that this Decision was in violation of a substantial procedural requirement.

Held: that the claim must fail. The duty placed upon this coal would have amounted to a special charge, within the meaning of Article 4 (c) of the Treaty, if it had affected only some of the enterprises in Luxembourg, or if it had been placed upon some only of the solid fuels being imported. As this duty did neither of these things, it did not amount to a special charge. The Treaty read as a whole showed that the Luxembourg Government could not impose a charge upon consumers in the other Member States of the Community. There was no provision in the Treaty which provided for the equalization of charges imposed by Member States within their own territories. Accordingly, the present charge was not forbidden by the Treaty.

Concerning the argument based upon the fact that the implied Decision had not been supported by reasons, the Court referred to Article 88 of the Treaty by which, if it deems a Member State to have failed in one of the duties imposed upon it by the Treaty, the High Authority is to set out that failure in a reasoned Decision. The Court held that although this requirement concerned an express Decision setting out the failure, there was nothing in the Article which referred to an implied Decision, so that an implied Decision did not have to be supported by reasons.

The Court said: " According to Article 4, the practices enumerated in sections (a), (b), (c) and (d) are ' inconsistent with the common market and therefore abolished and prohibited in accordance with the provisions of the Treaty '.

" Some of these practices are referred to in other provisions of the Treaty, namely: any action by a Member State that might have appreciable repercussions on the conditions of competition in the coal and steel industries, in Article 67 of the Treaty; and the special charges, in paragraph 3 of said Article and in sections 11 and 25, third paragraph, of the Convention containing the Transitional Provisions.

" According to Article 84 of the Treaty, the expression ' this Treaty ' must be understood as referring to the clauses of the Treaty and its annexes, of the annexed Protocols and of the Convention containing the Transitional Provisions. Therefore all the provisions contained in those texts have the same binding force and there can be no question of opposing those texts to each other; they can only be considered simultaneously in order to be adequately applied. . . .

" For the same reasons, the provisions of Article 4 are sufficient in themselves and directly applicable when they are not elaborated in other parts of the Treaty; on the contrary, when the provisions of Article 4 are referred to, elaborated or regulated in other parts of the Treaty, the texts referring to one and the same provision must be considered together and simultaneously applied. . . .

" Article 4 (c) prohibits the imposition of special charges in any form by the States. . . .

" The Treaty does not specify the elements which establish the speciality of a charge, but, in Article 67, para. 3, it gives the example of a charge which it calls special because it is imposed upon the coal and steel enterprises falling under the jurisdiction of a State in comparison with other industries of the same country. It is clear that the speciality of that charge is based upon the fact that it only affects a fraction of the industries which fall under the jurisdiction of the same State and are, consequently, in a comparable situation in so far as that State is concerned.

" However, the comparability of situations constitutes only a relative and changing criterion because it depends upon the scope of the field to which it applies. A charge which is general for all the enterprises of a State could cease to be such and become special when considering all the enterprises of the Community. Under these conditions, it is advisable, in case of doubt, to strengthen the criterion of comparability by checking the results to which it leads against those intended by the Treaty. . . .

" A charge can be assumed to be special, and therefore abolished and prohibited by the Treaty, when it introduces in the distribution of production distortions which do not result from variations of productivity, while unequally affecting the production costs of producers which are in a comparable situation.

" It is necessary to examine whether the imposition made by the *Caisse de Compensation*, in application of the Ministerial Decree of March 8th, 1954, is, on the basis of the above-mentioned criterions, a special charge in the sense of the Treaty. By virtue of Article 1 of the said Decree, the *Office Commercial du Ravitaillement* is authorized to increase the prices of solid fuel other than household fuel whatever its origin or kind or its intended consumer. The charge imposed upon solid fuel other than household fuel could be special if it affected only some of the enterprises falling under the jurisdiction of the Government of the Grand Duchy of Luxembourg; it would then be what the parties have agreed to call a charge upon the enterprises. It should be noted that in that case the charge would indeed affect the gradation of the costs of production otherwise than through variations of productivity.

" The increase imposed by the *Caisse*, however, concerns solid fuel other than household fuel whatever its kind or its intended consumer, and equally affects all consumers of solid fuel other than household fuel and therefore evidently is not a special charge on the ground of that criterion. Metallurgical coke which, on the same ground, is hit in the same way as the other kinds of fuel is therefore not affected by a special charge, notwithstanding the fact that the steel industries are the most important, if not the only, consumers of that product. Hovewer, the tax upon solid fuel other than household fuel in the Grand Duchy of Luxemburg, could also be special if it affected only a part of the solid fuel other than household fuel consumed by the Luxemburg economy, and in that case it would be the charge that the parties have called the charge upon the products.

" The effect of such a charge would indeed be to modify for the Luxemburg consumers of coal other than household coal the gradation of the costs of production resulting from productivity, and consequently to introduce distortions in the distribution of their sales within the common market. However, the price increase imposed by the *Caisse de Compensation* affects in Luxemburg all solid fuel other than household fuel, whatever its origin. Therefore it affects equally all the producers of the Community who sell coal other than household coal in Luxemburg, just as it would affect producers in the Grand Duchy, supposing that coal mines had been discovered there and exploited. . . .

" Under these conditions, the Court is of the opinion that it is not a special charge abolished and prohibited by Article 4 (c) of the Treaty.

" The Treaty abolishes and prohibits measures and practices which establish discrimination among producers, among buyers or among consumers. The concept of discrimination is defined in Article 60 of the Treaty, which declares discriminatory any practices involving the application of unequal conditions to comparable transactions within the common market. Even when it is not special, a charge can directly or indirectly bring about discriminatory effects among producers, among buyers or among consumers.

It is therefore necessary to examine whether the imposition made by the *Caisse de Compensation* must be considered as a measure or practice which establishes a discrimination abolished and prohibited by the Treaty.

" According to the Plaintiffs, the tax imposed by the *Caisse de Compensation* constitutes a measure which establishes a discrimination between the consumers of metallurgical coke and of industrial coal established in Luxemburg and consumers in the other Member States. It is true that the price increase of solid fuel other than household fuel imposed by the Ministerial Decree of March 8, 1954, normally affects only the Luxemburg consumers of this fuel and not consumers in the other Member States; it therefore establishes a difference between the costs of production of each of those categories. This difference could only disappear through the abolition of this price increase within the Grand Duchy or through the establishment of a similar price increase in the other Member States.

" The abolition and prohibition of special charges does not affect the right of the Member States to impose general charges upon their nationals. It matters little whether the charge is imposed in the form of a tax or a levy or in the form of an imposition for *péréquation* [equalization] with the same economic effects and the same financial consequences. Several provisions of the Treaty, especially in Article 62 and in sections 24 and 25 of the Transitional Provisions, make it possible to establish for certain purposes national funds or systems for compensation or for *péréquation* [equalization] impositions.

" Furthermore, the Court, in accordance with the conclusions of the Advocate General, is of the opinion that the Government of the Grand Duchy, although the Treaty does not deprive it of the right to impose a general charge upon the consumers of coal falling under its jurisdiction, is obviously not competent to extend this charge to the consumers of the other Member States. There is no provision in the Treaty which provides for the equalization of the charges imposed by the Member States in the fields falling under their respective jurisdiction. On the contrary, Article 62 proves that the Treaty has not deprived the Member States of their responsibility for general economic policy, seeing that it instructs the Council 'to harmonize the action of the High Authority and that of the Governments which are responsible for the general economic policy of their countries'.

" It follows from Article 67 that any action by a Member State which might have appreciable repercussions on the conditions of competition in the coal and steel industries falling under the jurisdiction of the Community is not necessarily abolished and prohibited by the Treaty and therefore does not necessarily constitute a measure or practice which establishes a discrimination prohibited by

Article 4 (b) of the Treaty; indeed, Article 67 authorizes the High Authority to compensate, through the grant of an aid, and therefore, under certain conditions, to tolerate and virtually to authorize the harmful effects of these repercussions on competition. Furthermore, Article 67, which is very carefully worded, provides only for intervention of the High Authority with regard to actions by Member States which have ' appreciable ' repercussions on the conditions of competition in the coal and steel industries or which are liable to give rise to a ' serious disequilibrium ' by ' substantially ' increasing differences in the costs of production otherwise than through variations of productivity.

" From the foregoing it follows that the Treaty admits that the abolition and prohibition of discriminatory measures and practices, provided for in Article 4 (b), cannot result in the establishment of an absolute equality of the conditions of competition prevailing in the coal and steel industries falling under the jurisdiction of the Community; nor could it result in the abolition of all repercussions on the conditions of competition which follow from the intervention of Member States which substantially increase the differences in the costs of production otherwise than through variations of productivity. The persistence of differences in the conditions of competition is the necessary and inevitable consequence of the incomplete nature of the integration realized by the Treaty, and it does not imply a discrimination prohibited by the Treaty.

" Article 67 confirms this interpretation, since it gives the High Authority the power to compensate, that is, to annul, the effects of the repercussions on competition which the Treaty has not abolished, and thus to prevent these interferences with competition—because they have survived the institution of the common market—from jeopardizing the mission which Article 2 has entrusted to the Community ' in harmony with the general economy of the Member States '.

" It is now necessary to examine, on the basis of the above-mentioned principles, whether the price increase of solid fuel other than household fuel resulting from the Ministerial Decree of March 8, 1954, constitutes a measure or practice which establishes among consumers a discrimination abolished and prohibited by Article 4 (b) of the Treaty. The form in which the levy was imposed upon the consumers of solid fuel other than household fuel does not make it possible to judge whether it is a discriminatory measure or practice prohibited by Article 4 (b) of the Treaty. That being so, it matters little whether it constitutes a tax, a levy or a price increase.

" The Court is of the opinion that the Treaty does not prohibit the price increase resulting from the Ministerial Decree of March 8, 1954, and that its effects are necessarily limited to the territory of the Grand Duchy of Luxemburg. The most the High Authority could have done, had it deemed that the action of the Luxemburg

Government produced harmful effects for coal and steel enterprises falling under the jurisdiction of that Government, was to authorize it to grant an appropriate aid to those industries. The High Authority was of the opinion that the tax imposed by the *Caisse de Compensation* 'cannot affect competition, either for the sales of coal, or for the sales of steel products, because of its slight repercussion upon the cost price of the steel produced by the Luxemburg steel industry'. The plaintiffs contest this statement and are of the opinion that, as the price of metallurgical coke represents about 30 per cent. of the cost price of steel products, the increase in price has, through its very grave influence upon the cost price of those products, appreciable repercussions on the conditions of competition between the Luxembourg producers and those of the other countries of the Community.

" In the present dispute, the Plaintiffs to not reproach the High Authority with having committed a *détournement de pouvoir* [an act which is *ultra vires*] nor with having obviously misinterpreted the provisions of the Treaty or of a rule of law relating to its application. The Court must therefore confine itself to examining whether, as regards the law, the price increase imposed upon solid fuel other than household fuel by the Ministerial Decree of March 8, 1954, violates the Treaty or any rule of law relating to its application. From what has been said above, it follows that, by applying to solid fuel other than household fuel the price increase resulting from the Ministerial Decree of March 8, 1954, the Luxembourg Government has taken a measure which is part of the general economic policy for which it remains responsible on the basis of Article 26 of the Treaty; it also follows that this measure is not a discriminatory practice prohibited and abolished by Article 4 (b) of the Treaty.

" The plaintiffs contend, as a subsidiary argument, that the implied negative decision is vitiated because of a major violation of procedure in so far as it is not based on expressed grounds. Article 88 of the Treaty stipulates that ' when the High Authority considers that a State has failed in one of the obligations incumbent upon it by virtue of this Treaty, it shall take note of the said failure in a reasoned decision'. The obligation to give reasons therefore applies to the Decision which, in the plaintiffs' contention, the High Authority was bound to take with regard to the Luxembourg Government. Nothing in Article 88, however, permits the conclusion that the same obligation exists with regard to a refusal to take a Decision on the basis of that Article. Consequently, the failure to give reasons for the implied negative Decision does not constitute a violation of Article 88 of the Treaty."

[Report: *Official Gazette of the European Coal and Steel Community*, 5th Year, No. 16, 1956, p. 190.]

NOTE.—In this case, which had some political implications, the Court was asked to declare illegal one of the municipal laws of a Member State. The Court, instead, adopted a somewhat restrictive interpretation of the Treaty. By Article 67, if any action of a Member State which might have appreciable repercussions is such that it is liable to provoke a serious disequilibrium by substantially increasing differences in costs of production, the High Authority may take certain prescribed measures, such as allowing the Member States to take steps to minimize any effects that this action is having within their territories. From this the Court deduced, first, that such action on the part of a Member State causing appreciable repercussions was not in itself illegal; and, secondly, that any action which did not go to the extent of having these appreciable repercussions was *a fortiori* not illegal. The Court did not hold that the clear terms of Article 4 of the Treaty abolishing tax-barriers, subsidies and restrictive practices constituted the overriding principles of the Community, but rather that they were principles which were surrounded by provisos in later Articles. This may be compared with the Court's declaration in *Italian Government* v. *The High Authority* (see *International Law Reports*, 1955, p. 737): " Articles 2, 3 and 4 of the Treaty, mentioned in para. 1 of Article 60, constitute the fundamental provisions establishing the Common Market and the common aims of the Community."

The argument concerning the invalidity of the implied Decision of the High Authority on the ground that it was not supported by reasons, as required by Article 15, was not dealt with by the Court. It might be said that to hold, as did the Court, that because Article 88 requires *express* Decisions finding a State to be in default to be supported by reasons, that Article, by implication, does not require *implied* Decisions to be so supported, is to hold that Article 88 has in some way modified Article 15. To that extent the present Decision of the Court does not, perhaps, give a full answer to the issue raised.

International Organization—Organs of International Administration—Postal Union of the Americas and Spain—Gratuitous Transport by Member of Mail of Other Contracting Parties—Liability for Cost of Transport—Avoidance of Double Payment.

UNITED FRUIT COMPANY *v.* UNITED STATES.

United States, Court of Claims. March 6, 1956.

THE FACTS.—This was an action against the United States by a United States corporation for compensation for carriage of " convention mails " during the period from June 26 to December 9, 1946. The plaintiff had time-chartered six vessels of Honduran registry from an Honduran company which was a wholly-owned subsidiary of the plaintiff and had transported for the United States both " convention " and " non-convention " mails on these vessels from New Orleans and the Panama Canal Zone to ports in Panama, Costa Rica, Honduras, Nicaragua, El Salvador, and Guatemala. The plaintiff had been paid for the " non-convention mail " so transported but not for the " convention mail." At the time of transport, the United States disclaimed any liability for the cost of transporting the "convention mail," and the plaintiff had protested.

All of the countries concerned were parties to the Convention of the Postal Union of the Americas and Spain, signed at Panama on December 22, 1936 (50 Stat. 1657—now replaced by the Convention of the Postal Union of the Americas and Spain, signed at Bogotá on November 9, 1955; T.I.A.S. No. 3653), Article 3 of which provided:

> "1. The gratuity of territorial, fluvial and maritime transit is absolute in the territory of the Postal Union of the Americas and Spain; consequently, the countries which form it obligate themselves to transport across their territories, and to convey by the ships of their registry or flag which they utilize for the transportation of their own correspondence, without any charge whatsoever to the contracting countries, all that which the latter send to any destination.
>
> "2. In cases of reforwarding, the contracting countries are bound to reforward the correspondence by the ways and means which they utilize for their own dispatches."

Mails so transported are termed "convention mails."

The Republic of Honduras required that when a Honduran navigation licence and Honduran registry were granted, the owner of the vessel waived any claim for the transportation of mail delivered to it by any country signatory to the Convention of the Postal Union of the Americas and Spain. In consideration of such waiver, Honduras granted exemption from beacon, wharfage, tonnage, and similar charges.

The plaintiff contended that the Republic of Honduras was liable to pay for the carriage of mail only if it utilized the vessel for transport of its own mails on the particular voyage; that the waiver of any claim for carriage was not executed for the benefit of the United States; and that, as a matter of municipal law, the United States could not seek the benefit of such a waiver.

Held: that the petition must be dismissed. The gratuitous carriage of mail under the Postal Convention applied to the transport of all mail of members of the Postal Union and was not limited to carriage of mails from or to the country of registry. Since the plaintiff had already been compensated by Honduras for the carriage of convention mails by being exempted from certain charges, it could not collect again.

The Court said: "Similar suits have been before us heretofore, but each of them, and this action as well, differ in some respects. In *United Fruit Co.* v. *United States*, reported in 103 Ct.Cl. 303, 308 *et seq.*, there was involved the carriage of mails by vessels flying the flag of Panama. Notwithstanding article 3 of the Convention quoted above, Panama denied liability for compensation for the carrying of them. We held that since the United States had required the carriage, and since Panama would not pay, the United States was liable.

" On the same day we decided *Standard Fruit & Steamship Co.* v. *United States*, also reported in 103 Ct.Cl. 659, 680 *et seq*. This suit involved the carriage of mails by vessels flying the flag of Honduras. Honduras did not deny liability to pay compensation therefor, and prior to their carriage the United States had disclaimed liability. Notwithstanding the non-acquiescence of plaintiff in this disclaimer, we held that there was no implied promise by the United States to pay for them, and we gave judgment for the defendant. Honduras later paid plaintiff.

" In *United Fruit Co.* v. *United States*, 81 F.Supp. 502, 112 Ct.Cl. 519, 528 *et seq.*, there was also involved the carriage of mails by vessels flying the flag of Panama. Defendant defended on the ground that the United States had disclaimed liability before the mails were carried. It, however, appeared that plaintiff had vigorously protested this disclaimer of liability, and it did not appear that the United States had persisted in its disclaimer in the face of this protest. Under these circumstances, and because Panama denied liability, we held that a promise to pay must be implied, especially since it was not within the power of the plaintiff to refuse to carry the convention mails, since they were commingled with the non-convention mails, which plaintiff was under the duty to carry.

" Now, in the case at bar there was also a disclaimer of liability by the United States, and continued protest by the plaintiff, without any resolution of the dispute at the time the mails here involved were carried. However, on August 30, 1954 the Ministry of Foreign Relations of the Republic of Honduras advised the United States Minister to Honduras, in part, as follows:

' . . . When your Ministry, through the National Merchant Marine Bureau, grants a navigation license and registry, the company or owner of the vessel is required " To waive any claim for transportation of mail delivered to it by the countries signatory to the Postal Union of the Americas and Spain," whence it is concluded that the Government of Honduras grants licenses to vessels of the said companies or private persons on condition that they transport the aforesaid mail in exchange for exemption from beacon, wharfage, and tonnage charges, subsidies, etc. . . .'

" Later, on October 4, 1954, the president of Empressa Hondurena de Vapores, the owner of the vessels transporting the mails, wrote the Postal Administrator of Puerto Cortes, Republic of Honduras, in part as follows:

' As far as I know, the only provision in effect on the subject is that indicated in Article 114, subparagraph 3, of Legislative Decree No. 45 of 1943, cited in the verbal note mentioned. In some contracts for the transportation of mail executed prior to the year 1943, between the Executive Power and steamship companies, the latter assumed the obligation of making the said transportation without any cost to the Government in exchange for the exemption from the payment of port charges, such as anchorage, clearance, lighthouse, etc.; see the contract with The Pacific Steam Navigation Company and that with the Compania Naviera del Pacifico, " Grace Line," both of the year 1937, published in Nos. 10226 and 10262 of the official daily " La Gaceta " of the said year.

' In regard to vessels of Honduran registry referred to in the preamble of the aforementioned transcription, whether they navigate in national waters or in those of other countries, they are obligated to carry gratis the mail from Honduras and to Honduras, in accordance with subparagraph 5 of Article 114 of the Postal Law.'

" It would, therefore, appear that the Republic of Honduras, which was liable for the payment for the carriage of the mails under article 3 of the Postal Convention, has paid for their carriage by exempting plaintiff's vessels from beacon, wharfage and tonnage charges, and by subsidies, etc.

" Plaintiff, having collected in this way from Honduras for the carriage of the mails, is not entitled to collect again from the United States. It is the Republic of Honduras that is primarily liable under the Postal Convention for the carriage of these mails, and it has paid for it in the way stated above.

" The aforementioned correspondence was written after the period in question, but we assume it is a statement of the conditions on which the vessels were licensed originally.

" Plaintiff also says the Republic of Honduras is liable to pay for the carriage of these mails only if that country utilized these vessels for the carriage of its own mails on the particular voyages when the United States utilized these vessels for the carriage of its mails. Article 3 of the Postal Convention is not so limited. Nor does Honduras undertake to so restrict its liability, as shown by the communication from its Ministry of Foreign Relations quoted from above. Neither does the owner of the vessels undertake to so restrict its liability, as shown by the extract from his letter set out above.

" Plaintiff says that in *Standard Fruit & Steamship Co.* v. *United States*, 103 Ct.Cl. 659, 684, we denied the counterclaim of the United States for money the United States had already paid the plaintiff in that case, based on the provisions of a contract between Honduras and the Standard Fruit and Steamship Company requiring the vessels to carry the mails to and from Honduras without charge, in consideration of certain concessions granted. We pointed out in that case that the contract was not made for the benefit of the United States and, hence, the United States could not maintain an action on it.

" Such a holding is, of course, quite different from a holding that the present plaintiff is not entitled to collect twice for the carriage of the mails. The Standard Fruit and Steamship Company did collect twice, but, even so, we could find no basis for a recovery by the United States of the money it had paid. The period involved in the counterclaim was from 1919 to 1942, and, hence, some of these mails were carried prior to the Postal Convention of 1932, 47 Stat. 1924, renewed in 1937, 50 Stat. 1657, and some thereafter. The Government's claim did not disclose how much was carried before and how much afterwards.

"Had the United States not paid for the mails carried after the Convention, and the Standard Fruit and Steamship Company had sued for the carriage thereof, we would have denied it recovery, even as we do in the present case. However, on the case presented we could find no basis for recovery by defendant."

[Reports: 134 Ct.Cl. 315; 139 F.Supp. 53.]

E—INTERNATIONAL OFFICIALS

International Organization—Officials of—Officials of United Nations—Staff Not Recruited Locally—Claim to Benefits of "Semi-Local" Status—Residence in Headquarters Area—Status of Escaped Prisoner of War in Neutral Territory.

STEPCZYNSKI *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. September 1, 1956.

(Lord Crook, Vice-President, presiding; Petrén, Vice-President; Venkataraman.)

THE FACTS.—Officials of the United Nations in the clerical grades are normally recruited within the local area of their duty station and their salary is fixed in accordance with salary scales established in the light of the local situation. Where it is not possible to recruit suitably qualified officials within the duty station area, officials may be recruited elsewhere, in which case they enjoy "semi-local" status, which entitles them to various benefits, including, in addition to their salary, a "non-resident" allowance. Without regard to nationality, persons who have lived for three years or more within the local area are excluded from the benefit of semi-local status.

The complainant, a Polish national, was made a prisoner of war by Germany in 1939. He escaped to Switzerland and was interned on October 18, 1941. From that date until November 14, 1946, the complainant was under the control of the Swiss Internment Commission with the status of a military internee. From November 14, 1946, to December 24, 1947, his status was that of civilian internee, and he was subject to the jurisdiction of the Federal Department of Justice and Police. On December 24, 1947, the internment order against him of October 18, 1941, was rescinded by the Swiss authorities, and the complainant remained in Geneva under an ordinary residence permit granted in accordance with the ordinary rules governing the residence of foreigners in Switzerland.

On July 1, 1949, the complainant entered the service of the United Nations under a fixed-term appointment, made in accordance with the conditions governing local recruitment prevailing at the time, which was later extended and converted to a temporary-indefinite appointment after his transfer and promotion. Various attempts to secure his re-classification as a " semi-local " official having failed, the complainant instituted proceedings before the Tribunal claiming that he should be classified in the semi-local category because he had not normally resided in Geneva for a period of three years before his appointment with the United Nations. Less than three years had elapsed between the date on which the internment order to which he was subject was rescinded and he thus became an ordinary resident in Switzerland, and the date on which he entered the service of the United Nations.

On behalf of the Secretary-General, it was argued that at the time of the complainant's recruitment Staff Rule 52 *bis* provided that officials appointed in his grade were normally to be recruited locally, and that although the letter of appointment did not contain any specific statement to that effect, the appointment was made in accordance with the conditions governing local recruitment then prevailing. The complainant did not qualify for payment of the non-resident allowance under Staff Rule 31 because he had not been recruited from outside the country of his official duty station, nor was his residential status at the time of his original appointment considered by the Secretary-General to warrant such payment. The acquisition of the status of an ordinary resident of Geneva under Swiss law could not be accepted as a criterion in determining for purposes of the United Nations Staff Rules that an official had " lived " in the Geneva area for a period of three years prior to his appointment by the United Nations. In arriving at the conclusion that the complainant had lived in the Geneva area for three years prior to his appointment by the United Nations, the Secretary-General took into consideration all relevant facts, including the fact that the complainant had been physically present in Geneva since the middle of 1944, that he was free since the middle of 1945 to leave Switzerland for any other country, that during the period of his legal internment he contracted marriage with a Swiss national, obtained a degree from a University and held a remunerated post in Switzerland before entering the service of the United Nations.

Held: that the complaint must be dismissed. From the moment the complainant entered Switzerland as an escaped prisoner of war, he was *ipso facto* free. He could apply for permission to leave Switzerland at any time, and actually had several opportunities of so doing. The conditions imposed upon the complainant by virtue of his internment were in the nature of restrictions on grounds of public security in neutral territory. The complainant lived in the Geneva area for three years prior to entering the service of the United Nations within the meaning of the Staff Rules.

After a detailed examination of the history of the rule granting non-resident allowances to officials in the general service category, the Tribunal said: " But the case does not rest here. Rule 52 in document Geneva/PM/3 quoted above contains Interpretation and Conditions as follows:

> " At Geneva, a staff member shall be considered a local recruit if he either: (a) has or has acquired Swiss nationality (whether or not he has a second nationality); or (b) has at the time of recruitment lived in the Geneva area for three years, the Geneva area being defined as Swiss romande and the area of France within reasonable commuting distance of Geneva (in general this will mean within 25 km. of Geneva).
>
> " The Personnel Division will be responsible for determining, before appointment, whether a staff member is to be treated as a local recruit.

" Both parties agree that the Applicant's claim to the allowances is governed by paragraph (b) of the Interpretation and Conditions mentioned *supra*. While the Respondent asserts that the Applicant had at the time of recruitment lived in the Geneva area for three years and that he should be treated as a local recruit, the Applicant denies that he had lived in the Geneva area for three years within the meaning of the rule and asserts his claim to allowances mentioned in Rule 52. Since the point for determination raises a mixed question of law and fact, details regarding the residence of the Applicant become relevant. The Applicant, a Polish national, was taken prisoner of war by Germany in 1939. He escaped to Switzerland and was there interned on 18 October 1941. From 18 October 1941 to 14 November 1946, the Applicant was under the control of the Swiss Internment Commission, with the status of military internee. From 14 November 1946 to 24 December 1947, he had the status of civilian internee. On 24 December 1947 the internment order of 18 October 1941 was rescinded by the Swiss authorities (document 22). During the relevant period, the Applicant contracted a marriage with a Swiss national and obtained a degree from a Swiss University. On 1 May 1945, he was appointed by the Polish Red Cross to work with the Swiss Committee for Medical Aid to Poland, which appointment he held until 30 June 1949. Two further circumstances have to be noted before the Tribunal proceeds to draw its conclusions. The Federal Department of Justice and Police, Switzerland, in its reply, dated 26 April 1952, to a query from the Respondent, stated that ' as soon as the armistice was signed, the civil and military authorities organised more than ten repatriation parties to enable Polish civilian and military internees to return either to France or to their homeland. . . . It may therefore be stated that Mr. Stepczynski could, as early as the middle of 1945, have returned to his own country or have proceeded to some other country for which he had an entry permit. From the Swiss point of view there was nothing to stop his departure after the armistice ' (Annex 1 to the Report of the Appeals Board—same as document 12 in the French text submitted). There was added to Order No. 337a, dated 27 June 1945 (Annex II to the Report of the Appeals Board—same as document 18 in the French text submitted) an additional instruction by the General Officer Commanding the Polish Army in the following terms:

" (a) soldiers should not be prevented from opting for one of these alternatives;

" (b) soldiers should be informed that the best solution for each would be to await orders on the subject from those placed in authority over him.

" It is contended by the Respondent that the term ' has lived ' used in the Interpretation and Conditions is different from the term ' resided ' previously used in a similar rule by the League of Nations, and the change in the terminology should be given due weight in considering the meaning to be attached to the expression. All the circumstances—such as his living in Geneva, getting married, taking a university degree, taking up employment, coupled with the freedom to leave Switzerland that the Applicant had from the middle of 1945—tend to the natural conclusion that the Applicant had lived in Geneva during the relevant period. Though the parties were disputing before the Tribunal whether the Applicant's presence in Geneva as a military internee and then as a civilian internee would amount to his living in the Geneva area within the meaning of parapraph (b) of the Interpretation and Conditions of Staff Rule 52, it was not realized that from the moment the Applicant entered Switzerland as an escaped prisoner of war he was *ipso facto* free under the Hague Convention (No. V of 1907) respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land, Article 13. Oppenheim's *International Law* [edited] by Lauterpacht, says (paragraph 337, at page 719, in Vol. II of the 7th Edition, 1951):

" ' Neutral territory is an asylum to prisoners of war of either belligerent; they become free *ipso facto* by coming into neutral territory, whether they have escaped from a place of detention and taken refuge on neutral territory, or whether they are brought as prisoners into neutral territory by enemy troops who themselves take refuge there. This principle has been generally recognised for centuries.'

" It would appear that the legal status of an escaped prisoner of war into neutral territory was fully realised by the Swiss authorities at all times. Thus in document No. 8, which is an office note prepared by the Administration after discussion with the Swiss authorities, it is stated:

" 'Even as a military internee Mr. Stepczynski was completely free to apply for permission to leave Switzerland, which according to Geneva authorities was never refused.'

" The conditions imposed upon the Applicant therefore were in the nature of restrictions on grounds of public security in neutral territory. In view of the Applicant's status from the time he entered Switzerland in 1941, and his continued stay in the Geneva area until the date of his employment with the United Nations, the Tribunal finds that the Applicant lived in the Geneva area for three years as contemplated in paragraph (b) of the Interpretation and Conditions of Staff Rule 52. The Tribunal therefore rejects the claim."

[Report: Judgment No. 64; United Nations Document AT/DEC/64.]

International Organization—Officials of—Conditions of Employment—Reference to Municipal Law—Applicability of Municipal Law Only to Extent Compatible with Internal Rules of the United Nations.

HILPERN *v.* UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST.

Administrative Tribunal of the United Nations. December 7, 1956.

(Madame Paul Bastid, President; Petrén, Vice-President; Venkataraman.)

THE FACTS.—This was a complaint by the former manager of the Cairo Office of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, who alleged wrongful termination of his appointment and claimed, in addition to damages for improper dismissal and vexatious delay in the treatment of his case, salary in lieu of sick leave and a termination indemnity based on length of service. On September 9, 1955, the Tribunal held that it had jurisdiction *ratione personae* and adjourned consideration of the merits of the case. In a further decision, given on August 30, 1956, the Tribunal held that the complainant's appointment was governed by such rules as were applicable to " area staff ", *i.e.*, officials recruited within the region. The Agency at first contended that area staff had not become entitled to termination benefits until after the termination of the complainant's appointment, but enquiries by the Tribunal elicited the fact that a formal memorandum dated December 19, 1951, from the then chief administrative officer of the Agency provided that

> " no terminal emoluments will be paid to area staff unless they are *bona fide* nationals of the country and were at no time Palestinian refugees. In the rare case of a *bona fide* national of the country, such a staff member will be entitled to the terminal emoluments prescribed by the local national labour laws of the country. Where no such labour law exists, no terminal emoluments will be paid."

The Tribunal, after holding that the complainant had no right to payment in respect of unused accumulated sick leave, and that there had been undue delay in the settlement of sums due to him, adjourned consideration of a number of issues which depended upon the provisions of Egyptian labour laws and the meaning of the expression "*bona fide* national", pending the submission by the Agency of further information on these questions, which the Tribunal ordered it to produce.[1]

When the Tribunal resumed consideration of the case, it had before it, in addition to the relevant provisions of Egyptian law, all relevant internal rules of the Agency, including the full text of the memorandum of December 19, 1951. The Agency contended that this memorandum was of a confidential nature and addressed by the head of the Agency's Administrative Division to the representatives on the spot, setting out policy decisions for their guidance. Such decisions, however, as distinguished from Administrative Instructions and Staff Rules, did not form part of the contractual relationship between the Agency and the staff members, and were subject to change and variation without the consent of the staff members concerned and even without notice to them.

Held: that staff members who were *bona fide* nationals were entitled to the terminal emoluments prescribed by the local national labour laws of the country [of employment]. Egyption law was applicable so far as it was compatible with the general principles embodied in the Staff Regulations of the United Nations. The claim for special indemnity and for sick leave reimbursement must fail; and under Articles 21 and 23 of the Egyptian Law No. 41 of 1944, the complainant would be entitled to a termination indemnity amounting to half a month's salary for each year of service, entitlement to this indemnity depending, however, upon his being a *bona fide* national of the country.

The Tribunal said: "The Respondent's contention that the memorandum did not confer any rights on the staff members is, however, contradicted by the wording of its paragraph (*a*), which provides that a staff member who is a bona fide national of the country will be 'entitled' to the terminal emoluments 'prescribed by the local national labour laws of the country'. While in paragraph (*b*) of the memorandum it is stated that the local national labour laws ought to be used as a 'guide' for payment of the *ex gratia* benefits for injury incurred during service, it is evident that the expression 'entitled' used in paragraph (*a*) of the memorandum confers a right on the staff [member] concerned. The Tribunal therefore finds that under the memorandum the staff members covered by paragraph (*a*) can claim the benefits envisaged therein.

"[With regard to the applicability of Egyptian law] . . . Although these benefits are described as the 'terminal emoluments' prescribed by the national labour laws of the country, the expression 'terminal emoluments' must, however, be interpreted in keeping with the system of terminal benefits established in the United Nations Staff Regulations and Rules. It appears to the Tribunal that only benefits of a nature corresponding to those contained in Chapter IX of the Staff Rules of the United Nations should be taken into account. The Tribunal therefore holds that provisions of Egyptian labour law relating to other matters—as, for example, compensation for wrongful dismissal or termination [of employment] for illness or incapacity—cannot be invoked by a member of the 'area staff' covered by the memorandum."

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[1] Judgment No. 63; United Nations Document AT/DEC/63.

The Tribunal considered, however, that it could not pronounce upon the intrepretation of the disputed term "*bona fide* national" without further hearings, the cost of which would be out of all proportion to the amount payable to the complainant should it be proved that he was a *bona fide* national, and continued: "The Tribunal therefore does not find itself justified in ordering such a procedure without first giving the parties an opportunity to arrive at a settlement between themselves in the light of the foregoing conclusions. If such a settlement is not reached, either party may submit the question to the Tribunal for its final determination."

The Tribunal awarded costs to the complainant in the amount of $150, on the ground that "the Respondent's denial of the Tribunal's competence and his delay in producing certain pertinent documents have prolonged the consideration of the case. Inasmuch as the delays were caused by the Respondent, the Respondent cannot avoid the obligation to compensate the Applicant for costs."

[Report: Judgment No. 65; United Nations Document AT/DEC/65.]

Note.—With regard to the jurisdiction of Administrative Tribunals over disputes involving members of the staff of local offices, and the application to such staff members of relevant provisions of municipal law, see *Desgranges* v. *International Labour Organisation* (*International Law Reports*, 1953, p. 523).

International Organization—Officials of—Officials of the United Nations—Privileges and Immunities of—Waiver of—Acquisition of Nationality Conditional Upon Waiver of Privileges and Immunities—Authorization of Secretary-General—Refusal of Authorization—Universal Declaration of Human Rights, 1948.

KHAVKINE *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. December 8, 1956.

(Madame Paul Bastid, President; Petrén, Vice-President; Lashly, Venkataraman.)

THE FACTS.—This was a complaint by a former official of the United Nations alleging that the Secretary-General of the United Nations had improperly refused the complainant authorization to execute a waiver of privileges and immunities required to enable him to acquire permanent-resident status in the United States. The complainant, who was born in Russia and subsequently acquired French nationality, had in 1940 applied to the United States authorities for a permanent-residence visa, as a preliminary step in the acquisition of United States citizenship and nationality. The complainant entered the service of the United Nations on October 7, 1946. On July 10, 1955, he was notified by the United States authorities that he would be granted the permanent-residence visa for which he had applied in 1940, provided he signed the waiver of privileges and immunities required under Section 247(a) of the United States Immigration and Nationality Act of September 24, 1952. The effect of such a waiver would have been to place the complainant in the same position as United Nations officials of United States nationality who are, *inter alia*, liable to United States income tax on emoluments paid by the United Nations. Such officials benefit, however, from reimbursement by the United Nations of income tax levied by the United States on their salary, in accordance with the United Nations Staff Assessment Plan. Furthermore, upon acquiring permanent-resident status in the United States, the complainant would cease to be regarded as a French national for United Nations purposes.

On July 13, 1955, the complainant requested the Secretary-General's authorization to sign the waiver, but this was refused. On July 29, 1955, the complainant submitted his resignation with effect from November 1, 1955, and this was accepted on August 2, 1955. On October 21, 1955, he requested the Administration to reconsider its decision and, upon its refusal, filed an appeal with the Joint Appeals Board on November 18, 1955. The Board reported to the Secretary-General, on January 31, 1956, that it had no recommendation to make in support of the appeal. On May 3, 1956, the complainant instituted proceedings before the Tribunal, requesting rescission of the Secretary-General's decision whereby he had been denied the right to sign the waiver of privileges and immunities in order to acquire permanent-residence status in the host country, and re-instatement in his former position.

In support of his complaint, the complainant argued that the decision to refuse authorization to execute the waiver constituted an improper application of administrative power. Freedom of movement and change of residence were rights proclaimed in Article 13 of the Universal Declaration of Human Rights of 1948, and there was no justification for denying such rights to an official provided that the change of residence did not interfere with his duties as an official. Execution of the waiver was compatible with the status, duties and functions of a United Nations official since it did not involve renunciation of the privileges and immunities necessary for the independent exercise of those functions which are provided for in Article 105 of the Charter. The privileges and immunities involved in the waiver, and specifically the immunity from taxation, had no relation to an official's functions and did not come within the scope of Article 1.8 of the Staff Regulations, which rests in the Secretary-General alone power to waive immunities, since that provision referred exclusively to privileges and immunities related to official acts.

The complainant further contended that the Secretary-General could not in support of his decision rely upon the report submitted by the Fifth (Administrative and Financial) Committee to the Eighth Session of the General Assembly of the United Nations on the question, because constitutional processes were not observed by the Fifth Committee, which had ventured to modify and change the terms of employment of officials without having been empowered by the General Assembly to do anything of the kind. The action of the General Assembly was similarly not legal because no resolution concerning those terms of employment had been presented to the General Assembly. The decision of the Secretary-General was thus contrary to previous decisions of the General Assembly. Nor was the decision of the Secretary-General justified by the intentions manifested and the decisions taken by the Fifth Committee, since that Committee had intended not to limit to exceptional cases only the granting to officials of authorization to change their status to that of permanent resident, but to make a distinction between officials who had been unaware, when applying for permanent-residence status, of any problem which might subsequently arise in this connection and persons subject to future recruitment policy; the complainant fell within the first category since he had applied for permanent-residence status in 1940.

Fiscal considerations and the decisions of the Fifth Committee could not justify the Secretary-General's decision. Refusal to authorize officials to acquire permanent-residence status without reimbursement of income tax, to which they would become liable, could not be defended on the ground that it might be contrary to established principles. In any case, and whatever decision was taken regarding the question of tax reimbursement, the complainant contended that he should be entitled to sign the waiver under the decisions of the Fifth Committee, particularly as no important additional financial burden would be occasioned.

Finally, the complainant's resignation was brought about as a result of moral compulsion exercised upon him by the Administration.

On behalf of the Secretary-General, it was argued that the complainant's contention that he was denied the right of freedom of movement and residence within the borders of the host country was without merit, and his reference to the Universal Declaration of Human Rights was irrelevant since he confused general human rights with particular conditions of service governing his employment.

The policy of the Secretary-General to restrict the granting of permission to execute a waiver of privileges and immunities for the purpose of assuming the legal status of a permanent resident in the host country to cases in which he was convinced that exceptional and compelling circumstances warranted the decision, was based primarily upon his duty to enforce the principle of geographical distribution in the selection of staff, as prescribed in Article 101, paragraph 3, of the Charter, and re-affirmed in Staff Regulation 4.2. The relationship between the visa status of the staff and the principle of geographical distribution had been enunciated by the Secretary-General in Information Circular ST/AFS/SER.A/238, dated January 19, 1954. The Secretary-General's restrictive policy was also guided by the principle of reimbursement to staff members of national income tax. It was based upon the principle of equality among staff members as enunciated by the General Assembly at its First Session in Resolution 13 (I) Part V. Thus, the policy consistently followed by the Secretary-General had been that all staff members without exception, who were permitted to sign the waiver, also received income tax reimbursement.

As regards the question of the legality of the Fifth Committee's decisions, which the complainant questioned, the Fifth Committee in its report (document A/2615, paragraph 73) was expressing itself on matters of policy merely for the guidance of the Secretary-General. There was no intention to extend the general discretionary powers of the Secretary-General which he already held in these matters, nor were these decisions in conflict with the policies previously laid down by the General Assembly. Thus no formal resolution was required for adoption by the General Assembly.

As regards the complainant's argument that the procedure established in the host country for acquisition of permanent-residence status involved the waiver of fiscal immunity as distinct from judicial immunity, and that the Secretary-General was not entitled to object to the filing of a waiver of such immunity, the contested decision was made by the Secretary-General in the exercise of his discretionary power, inherent in the duties of heads of international organizations, which was vested in him by the General Assembly when it adopted Section 20 of the Convention on Privileges and Immunities of the United Nations and the Staff Regulations of the United Nations. It was not based on improper motivation and hence there could be no finding of misuse of power. The Secretary-General's right to waive the privileges and immunities of staff members was not limited to privileges and immunities related to official acts. This was not the intention of the General Assembly when it adopted Staff Regulation 1.8, which in no way qualified the scope of the privileges and immunities subject to the determination of the Secretary-General " with whom alone it rests to decide whether they shall be waived ".

There was no misinterpretation of the Fifth Committee's decisions on the part of the Secretary-General. The Fifth Committee, in considering the problem of tax reimbursement at the Eighth Session of the General Assembly, evidently had not intended to go further and authorize waivers without reimbursement by staff members who were not stateless persons. Had the Fifth Committee intended otherwise, it would not have decided that persons of " permanent-residence status " would in future be ineligible for appointment as international staff unless they changed to " international visa status ". As for the contention that in view of the Fifth Committee's decision to cancel certain benefits and allowances of staff members who acquired permanent-residence status, the authorization to sign the waiver would impose no additional financial burden upon the Organization, the correctness of the Secretary-General's judgment could not be tested by reference to financial considerations alone. In exercising his discretion as to when any waiver of privileges and immunities could be authorized, the Secretary-General necessarily took into account all elements affecting the interests of the Organization.

The complainant's contention that his resignation was brought about as a result of moral compulsion exercised upon him had no basis in fact. His resignation from the Secretariat was voluntary and did not result from any administrative action upon which the Tribunal could pass judgment for non-observance of his contract of employment or terms of employment.

Held: that the complaint must be dismissed. Under the law of the United Nations, a waiver of privileges and immunities was not a matter of personal concern but must be decided upon by the Secretary-General. No waiver of privileges and immunities could be executed without the authorization of the Secretary-General.

The procedure followed by the Fifth Committee was in conformity with the rules of procedure, and the Secretary-General was entitled to rely upon the decisions of the Committee. The implementation of the Assembly's policy with regard to changes in the status of officials for the purposes of the United States Immigration and Nationality Act, 1952, was left to the discretion of the Secretary-General. Where the execution of a waiver of immunity bore upon executive management and thus affected the substantial interests and purposes of the United Nations, the right of decision belonged to the Secretary-General. The complainant's resignation was freely tendered by him in what appeared to him at the time to be his best interests, and therefore barred further prosecution of any rights or claims against the United Nations.

The Tribunal said: " The Applicant requests the Tribunal to decide that the refusal by the Secretary-General to authorise him to sign the waiver of privileges and immunities required under the United States Law in order to acquire a permanent residence status was illegal. He contends that his resignation in consequence thereof was without legal basis, null and void. The Applicant asks for reinstatement with all rights of his permanent contract.

" The question put to the Tribunal arises from the adoption by the United States Congress of the Immigration and Nationality Act dated 24 December 1952. Under this Act,

> " ' the United States authorities shall adjust to non-immigrant status any non-United States citizen in permanent residence (immigrant) visa status who has an occupational status which would entitle him to a diplomatic or international organisation visa (G-4). The Attorney-General will cancel the record of such person's admission for permanent residence, and his immigrant status will therefore be terminated. The adjustment of status which is thus required is made inapplicable by the Act, however, if the individual files with the Attorney-General a written waiver of all rights, privileges, exemptions, and immunities under any law or an executive order which would otherwise accrue to him because of his having an occupational status entitling him to the non-immigrant status.' (As summarized in circular ST/AFS/SER.A/238).

" According to an opinion of the Attorney-General of the United States,

" ' a staff member who signs the waiver can enjoy, under United States law, the same privileges and exemptions as are available to a United States citizen employed by the United Nations, but cannot assert privileges not available to a United States citizen. Specifically, he would remain immune from suit and legal process in relation to his official United Nations functions, but he would become liable to United States income taxation on his United Nations income.' (As summarized in circular ST/AFS/SER.A/238).

" The matter of waiving the privileges and immunities of members of the staff of the Secretariat has been regarded as of great importance in view of its connection with Article 105 of the Charter.

" Article 1.8 of the Staff Regulations provides:

> " ' The immunities and privileges attached to the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organisation. These privileges and immunities furnish no excuse to the staff members who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations. In any case where these privileges and immunities arise, the staff member shall immediately report to the Secretary-General, with whom alone it rests to decide whether they shall be waived.'

Accordingly, while under the American Law the waiver of privileges and immunities may be a matter of personal concern, under the law of the United Nations it is a matter for the Secretary-General to decide, and no waiver can be executed by a member of the staff without his authorisation. In view of the problems involved by the application of the Immigration and Nationality Act to the United Nations staff, the Secretary-General requested the General Assembly to provide him with guidance in this respect. In the circular dated 19 January 1956 (ST/AFS/SER.A/238), the Secretary-General informed the staff of certain decisions taken by the General Assembly at its eighth session upon the report of the Fifth Committee on the subject of adjustment of the positions of various staff members affected by the provisions of the United States Law in question. The Fifth Committee report expressed the view that

> " ' any internationally recruited member of the Secretariat who asked and received authority to change from a G-4 (or equivalent) visa status to a permanent residence status should not thereby acquire any entitlement to reimbursement of national income taxes. However, in exceptional cases to be defined by the Secretary-General in the staff rules, a member of the Secretariat may be permitted to change his status without thereby forfeiting the possibility of acquiring entitlement to such reimbursement.' (A/2615, paragraph 66.)

The report, however, disclosed that a number of delegations expressed a strong measure of opposition to any extension of the policy of national income tax reimbursement (*Official Records*, General Assembly, eighth session, Agenda item 51, paragraph 63 *et seq.*).

" The Applicant contends that the Secretary-General, in making his determination in this instance, relied upon the above-mentioned procedures by the Fifth Committee and that the actions of that Committee in respect of waiver of privileges and immunities are completely illegal and are in violation of constitutional processes; that the decision of the Fifth Committee to establish a special category for staff members who might change their G-4 visa to one of permanent residence status would be unenforceable as the proposal was not reduced to writing as provided in Rule 121 of the Rules of Procedure; and that, in the absence of a specific resolution passed by the General Assembly, the proceedings of the Fifth Committee cannot support the refusal of the Secretary-General to authorise a staff member to waive privileges and immunities. In the view of the Tribunal the proceedings of the Fifth Committee in question followed the normal course. In meetings of a main committee, it is within the province of the Chairman under Rule 121 to take up any oral proposal, and, following the usual practice, an oral proposal covering this subject was adopted by the Committee which was reflected in its report to the General Assembly. The Applicant further contends that in the absence of any resolution passed by the General Assembly, the Respondent cannot rely on the proceedings of the Fifth Committee in support of his refusal to authorise the waiver of privileges and immunities. In the view of the Tribunal, this contention is inconsistent with the procedures normally followed by the United Nations. The normal procedure in the General Assembly is that after the adoption of the agenda for the session, items belonging to the same category of subjects are referred to one of the main committees (Rule 99). After discussion, the Committee then prepares its report on the item to the General Assembly. In accordance with Rules 67 and 68, the report already adopted by the main committee would not be brought up for discussion unless as many as one-third of the members present should consider discussion necessary. It is clear that the adoption of a report by a main committee has, after its submission to the General Assembly, the same validity and effect as a specific decision of the General Assembly in respect of the matters contained in the report. It will be noted that paragraph 73 of the report of the Fifth Committee (Document A/2615, Exhibit 6) contains the following recital:

" ' It was the understanding of the Committee that these decisions should be recorded in its report to the General Assembly for the guidance of the Secretary-General in giving effect to these policies thus approved through appropriate amendments to the Staff Rules.'

It appears from paragraph 14 of the summary records of the 426th meeting of the Fifth Committee that the Chairman had explained that ' the Committee had taken a decision and the Secretary-General should take it into account in implementing the principles adopted ' (Exhibit 11). The report of the Fifth Committee was presented to the 471st plenary meeting of the General Assembly. The Tribunal therefore finds that the procedure followed by the Fifth Committee is in conformity with the rules of procedure and that the Respondent is entitled to rely on the decisions of the Committee.

" The Secretary-General informed the staff in the Circular issued on 19 January 1954 (ST/AFS/SER.A/238) of the decisions taken by the Fifth Committee and indicated the manner in which he intended to implement those decisions when the question of waiver of privileges and immunities should arise in connection with the acquisition of permanent residence status. In the circular it was stated that requests for permission to sign the waiver of privileges and immunities in order to change fron non-immigrant to a permanent residence status would be considered individually, with attention given to how such a change might affect the principle of geographical distribution. In general, staff members in salary categories G-5 and above were to be granted authorisation to sign the waiver of privileges and immunities only when the Secretary-General was convinced that the urgent and compelling circumstances of the case warranted such a decision. These proceedings leave no room for doubt that implementation of the policy of the Fifth Committee and the General Assembly concerning changes in staff procedures made necessary by the action taken by the United States authorities was left to the sound discretion of the Secretary-General and that the situation was fully disclosed to the staff by the Secretary-General.

" The Applicant vigorously contends that the Secretary-General does not have discretionary power to decide such questions as changes in nationality or citizen status, or tax exemptions, and in particular those exemptions which are peculiarly within the sole and direct interest of the staff member involved, and not of those types or classes of immunities or privileges contemplated under Article 105 of the Charter, or Regulation 1.8 of the Staff Regulations, which could be waived only by the Organisation itself. It is argued by the Applicant that the problem presented by the United States Immigration and Nationality Act of 1952 comes down to the single question of waiver of income taxes upon his salary and income derived from his services with the United Nations, and that with this question the Secretary-General has nothing to do, since it does not involve the official functions of a staff member and the powers of the Secretary-General must be circumscribed by the purposes and interests of the United Nations. In Staff Regulation 1.8 it is provided that in every instance where a question arises as to the privileges and immunities attached to the United Nations by virtue of Article 105 of the Charter, the staff member involved shall immediately report to the Secretary-General, with whom it rests to decide whether they shall be waived. It seems clear, even in instances where only the staff member is required to make a claim or execute the waiver of privileges and immunities and personally accepts the primary benefits of the waiver, that where (as here) the transaction bears upon executive management at various points and thus affects the substantial interests and purposes of the United Nations, it is the duty of the staff member to submit the problem to the Secretary-General who has the right of decision. That the Applicant was aware of the existence of such a right of the Secretary-General is evident from paragraph no. 2 of his letter dated 13 July 1955. In requesting the Secretary-General for permission to execute the waiver of privileges and immunities, the Applicant stated: 'I appreciate the fact that such authorisations are not always granted to staff members in the Professional category '.

" For the foregoing reasons, the Tribunal holds that the Respondent's decision under consideration was within the scope of his authority as Secretary-General.

" There is yet a further consideration which even more strongly bears upon the right of the Applicant to recovery and relief. It is the resignation. No charge has been made that the resignation and acceptance were not valid when given, or that they were obtained by fraud upon the part of the Secretary-General or any other person; or that the exchange of the resignation and acceptance papers came about through mutual mistake. The relief sought is revocation of a determination of the Secretary-General to withhold his official permission for the Applicant to sign and submit a waiver of privileges and immunities such as was required by the United States Government. There appears to have been no difference or misunderstanding between the Applicant and the Secretary-General as to the facts. The Applicant had decided to sign the necessary waiver; the Secretary-General had decided that it was against his duty to give it, and refused to do so. The impasse was resolved by the Applicant, who resigned from his position effective in three months. The permission then was made available. The Applicant complains that his resignation was ' brought about as the result of moral compulsion exercised upon him ', but it appears from the facts submitted that the decision to resign was made according to what at the time seemed to him to be his own best interests. There was no substantive choice involved, since at the outset his mind was made up. In his letter of 13 July 1955 (Exhibit 1) he stated, ' As I feel I must take this opportunity to acquire permanent residence status in this country . . .' There is no suggestion of choosing here—his decision as to ultimate action had been made, and announced. It remained only to determine how the decision could be implemented and his declared purpose accomplished. At this point the Applicant was confronted with a procedural election. Upon the refusal by the Secretary-General to authorise a waiver which was the *sine qua non* imposed by the United States Government, two courses of procedure were presented: (a) to execute the waiver without the permission of the Secretary-General and if as a consequence he should be terminated, to approach the Tribunal with a clear issue as to the validity of his termination; or (b) to resign his position with the Secretariat, thus removing any obstacle as to the waiver. The Applicant, when squarely confronted with these alternatives, described his choice as follows in his letter of 29 July 1955:

" ' I have therefore regretfully come to the conclusion that the only way for me to acquire permanent residence status in the United States is to resign from the Secretariat of the United Nations '. (Exhibit 3).

" Having chosen the second alternative, the Applicant resigned and was promptly officially informed that the Secretary-General had no objection to his signing the waiver for which permission previouly had been declined. In the absence of any ground which would warrant cancellation of the resignation submitted by the Applicant, it follows that the resignation bars further prosecution of any rights or claims upon his part against the United Nations.

" The Tribunal has noted that the Applicant claims that the refusal of the Secretary-General to permit him to sign the waiver was in violation of the Universal Declaration of Human Rights in that it amounted to a denial of freedom of residence. In his answer the Respondent states that this contention of the Applicant is irrelevant and that he confused general human rights with particular conditions of service which govern his employment contract. With this position of the Respondent the Tribunal is in agreement."

[Report: Judgment No. 66; United Nations Document AT/DEC/66.]

International Organizations—Officials of—Awards of Compensation to—Exemption from Income Tax on Sums Payable by United Nations—Resolutions of General Assembly—Staff Assessment Plan—Resulting Inequality Among Member States—Lack of Competence of Tribunal to Impose Resulting Burden Upon United Nations.

HARRIS *ET AL.* *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. December 10, 1956.

(Madame Paul Bastid, President; Petrén, Vice-President; Loutfi.)

THE FACTS.—The first complainant and seven other former officials of the United Nations were awarded by judgments of the Tribunal damages for wrongful dismissal or damages assessed by the Tribunal in lieu of reinstatement previously so ordered. The judgment awards were satisfied by the Secretary-General through the payment of lump sums. The complainants claimed the right to reimbursement of United States Federal and State income tax levied upon the lump sum awards on the ground that no distinction should be made between awards of compensation and other salary or emoluments for the taxation of which the United Nations had agreed to make full reimbursement to officials. No such distinction had been made in the past, and it would constitute a monetary discrimination against nationals of those States which did not exempt their nationals from income tax on salary and emoluments paid by the United Nations. Although the awards were intended as compensation for the prospective loss of employment during the next several years, the awards were paid and received in a single year, 1955, and were taxed upon this basis, so that the complainants were required to pay taxes at a rate and in amounts considerably higher than would be required of them had they remained in the service of the United Nations.

On behalf of the Secretary-General, it was argued that the judgments providing for awards in lieu of reinstatement were made by the Tribunal in full and final settlement of the rights of the parties and were *res judicata*. The lump sums could not be regarded as salaries and emoluments and were therefore not subject to tax reimbursement. Refusal of tax reimbursement involved no discrimination against the complainants on the basis of nationality, since in providing for reimbursement of income tax the General Assembly never intended to protect officials from national taxation on all kinds of payments made to them by the United Nations, but only on salaries and emoluments, and the deprivation of income tax reimbursement was the inevitable result of the limitations of the system created by the General Assembly which the Secretary-General was bound to apply.

Held: that the complaints must be dismissed. The compensation awarded by the Tribunal must be distinguished from salary or arrears of salary, and therefore the clause in the complainants' contract of employment providing for reimbursement of income tax on salary did not apply. On this point the Tribunal said: "This compensation was intended to repair all the prejudice suffered by reason of the fact that the contract had ceased to be effective. It is clear from the terms of the judgments and from the Tribunals' statements in Judgments No. 39 and 41 that the compensation was fixed in the light of the advantages which might have been expected to accrue from the contract and of the possibilities of finding other employment, allowance being made for the *de facto* circumstances peculiar to each applicant. By its very nature, this compensation is fixed in the light of personal circumstances and is distinguishable from the system of remuneration applicable to serving staff members, which is fixed by means of general provisions. The compensation is intended to repair a wrong, not to remunerate services."

Since the compensation awarded by the Tribunal was not subject to the Staff Assessment Plan, the Resolutions of the General Assembly did not authorize the Secretary-General to refund the corresponding amount of the internal assessment even if the compensation should be subject to national taxation. However, since the requirements of the General Assembly decision relating to the Staff Assessment Plan were waived in certain cases, the Tribunal must consider whether the failure to refund the national income taxes levied on the compensation awarded by the Tribunal was inconsistent with the fundamental principles underlying the system of the Staff Assessment Plan, namely, the principle of equity among Member States, the principle of equality among staff members, and protection against double taxation. The Tribunal found that the question of double taxation was not relevant because the compensation question was not subject to staff assessment. The principle of equality among staff members was also not applicable, since the awards bore no relationship to payments made to all staff members pursuant to statutory provisions applicable to all of them. As regards the principle of equity among Member States, if a large proportion of the compensation awarded to the complainants out of funds constituted by the contribution from all the Member States was recovered as income tax by a particular Member State, the principle of equity postulated by the General Assembly could not be said to be upheld, However, it was not for the Tribunal to rule that, as a consequence, the United Nations had a duty to reimburse the individuals concerned.

[Report: Judgment No. 67; United Nations Document AT/DEC/67.]

International Organization—European Coal and Steel Community—Officials of—Period of Probation—Competence of Official—Evaluation of, by Administration—Control by the Court.

MIROSSEVICH *v.* HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY.

Court of Justice of the European Coal and Steel Community.

(Pilotti, President; Rueff, Riese, Serrarens, Delvaux, Hammes and van Kleffens JJ.)

December 12, 1956.

THE FACTS.—This was a complaint by an official of the High Authority who had been recruited to perform the functions of Interpreter-Translator. After one month's service as a translator, the complainant was informed that the trial period had proved unsatisfactory and she was transferred to another service in another grade. The complainant sought restoration of the position she formerly enjoyed, on the grounds that she had been appointed as a translator and, alternatively, that if she was to undergo a period of probation, she had not been given a fair opportunity to prove her worth and had in fact been declared incompetent in order to allow of the appointment of a friend of her supervisor.

Held: that the complainant must be re-instated. She had been appointed as a probationer official, and she should now serve a new period of probation under the conditions laid down in the Staff Regulations in force at the date of the judgment. No compensation was to be awarded, since the loss suffered by the complainant was hypothetical. While it was for the administration to evaluate the competence of officials, the manner in which such evaluation was made was subject to review by the Court. It appeared that the complainant had been given insufficient opportunity to prove her worth, and since there was thus a presumption that the period of probation she was undergoing was not conducted in a regular manner, it was for the administration to prove the complainant's incompetence, which it failed to do to the satisfaction of the Court. As to the allegation of misuse of power by the complainant's supervisor, the Court found that this was not supported by evidence.

[Report: *Recueil de la Jurisprudence de la Cour*, vol. II (1955–1956), p. 371.]

International Organization—European Coal and Steel Community—Officials of—Contract of Employment—Interpretation of—Whether a Public Appointment—Illegal Termination of Appointment—Compensation Therefor.

KERGALL *v.* COMMON ASSEMBLY OF THE EUROPEAN COAL AND STEEL COMMUNITY.

Court of Justice of the European Coal and Steel Community.

(Pilotti, President; Delvauz, van Kleffens, Serrarens, Riese JJ.)

July 18, 1955.

THE FACTS.—The complainant was employed by the Common Assembly of the European Coal and Steel Community under a two years' contract of employment dated January 10, 1953, with effect from December 6, 1952. This contract was entered into before Staff Regulations governing the conditions of employment of officials of the Community had come into force. On June 15, 1953, the officers of the Common Assembly decided to abolish the post of Chief of the Administrative Services held by the complainant, upon expiry of the contract of its incumbent. On June 16, 1953, the Secretary-General of the Common Assembly notified the complainant of the decision of the officers and of the fact that consequently he would not be able to extend the complainant's contract. That decision was subsequently confirmed by the officers, who also offered a special indemnity to compensate the complainant for any hardship he might suffer as a result of this decision. The offer was subsequently withdrawn when the complainant refused to acquiesce in the decision not to extend his contract. The complainant sought from the Court a declaration that the decision not to renew his contract was illegal and caused him an injury; compensation for the injury sustained; termination indemnity, including the special indemnity originally offered; and payment of a car allowance.

Held: that contracts of employment concluded with officials of the Community pursuant to the Convention concerning Transitional Measures (annexed to the Treaty instituting the Community) created a legal relationship extending beyond the confines of employment contracts under private law, and that such contracts were public appointments. The complainant had not been appointed as a probationer or to carry out functions of a temporary nature. In limiting the appointment to two years it was not necessarily intended to limit the period of service accordingly, but to cover the period to elapse before a permanent appointment could be granted upon the coming into force of Staff Regulations. The complainant should therefore have been treated in the same manner as officials of the Community under the proposed Staff Regulations, the draft of which was known to the officers. While it was for the administration to appreciate the professional competence of officials, lack of competence had not been relied upon to justify the decision appealed against, nor had it been proved as a result of a regular procedure, so that the Court could not take into account allegations of incompetence made ex post facto to justify the decision. Officers of the Common Assembly were competent to abolish the complainant's post and to organize its secretariat in the manner they considered most efficient. The abolition of a particular post did not necessarily involve the termination of the appointment of the incumbent of that post, especially where the contract of employment did not specify the post assigned to the official concerned, and such abolition merely released the official in question for assignment to other duties. However, the non-renewal of the complainant's contract was irregular and caused him an injury, for the compensation of which the Community was liable. The Court therefore awarded the complainant an additional indemnity, making the total compensation payable by the Community equivalent to eighteen months' salary instead of two.

The Court said: " . . . The Court holds that if the contract of employment concluded on 10 January 1953 between the Common Assembly and the complainant has the appearance of a fixed-term contract of employment, it is nevertheless a contract *sui generis*. This contract must be interpreted in the light of the provisions of the Treaty [instituting the Community] and of the Internal Rules it refers to, but account being also taken of the intentions of the parties and the policy of the Community with respect to its officials. The preamble of the contract refers to paragraph 7, clause 3, of the Convention concerning Transitional Measures [appended to the Treaty], which provides that

> " 'pending determination by the Commission provided for in Article 78 of the Treaty of the establishment and the adoption of Staff Regulations, the necessary staff shall be recruited under contract.'

The reference to this provision clearly establishes that the contract of employment was a preliminary to a statutory appointment [*établit nettement le caractère pré-statuaire du contrat d'emploi*]. According to Articles 1 and 2 of the contract of employment, ' Mr. Kergall enters the service of the Common Assembly. The contract comes into force on 6 December 1952, for a period of two years.' The words ' enters the service ', and the fact that the complainant was appointed as an official of the first category, which comprised the Secretary-General, the Deputy Secretary-General, Chiefs of Service and assimilated staff, shows, or at least gives rise to the legitimate belief, that the appointment could only be one granted to an official entitled, subject to certain conditions, to stability of employment, that is, to a permanent appointment within the framework of the Staff Regulations. On the other hand, in limiting the duration of the contract to a period of two years, the parties did not necessarily intend to treat the contract as a fixed-term appointment, but complied rather with the general view of the principal organs of the Community which felt at the time that two years would suffice to frame and to put into force Staff Regulations. Consequently, the Court is of opinion that the appointment of the complainant created a legal relationship extending beyond the confines of employment contracts under private law. Furthermore, Article 15 of the contract of employment of the complainant provides that officials shall receive an indemnity upon expiry of the contract if they are not to enjoy the benefits of permanent Staff Regulations, while Article 51 of the Provisional Staff Regulations of 1 July 1953 provides that these Regulations will be replaced *juris et de jure* by the Permanent Regulations as soon as they are adopted. Thus the contract of employment and the Provisional Staff Regulations both envisage and provide for the application of Staff Regulations and so justify the complainant's expectation. Finally, the contract of employment of the complainant is a contract under public law; this contract bears upon service with a public authority, for the purposes of which the complainant was called upon to exercise functions pertaining to public law, while the contract itself refers to internal rules made by that authority. It follows that the legal position of the complainant is that of a temporary public official."

[Report: *Recueil de la Jurisprudence de la Cour*, vol. II (1955–1956), p. 11.]

NOTE.—See also *Bourgaux* v. *Common Assembly of the European Coal and Steel Community*, decided on December 17, 1956, by the Court of Justice of the Community (Pilotti, President; Rueff, Riese, Serrarens, Delvaux, Hammes and van Kleffens JJ.). This was a complaint against the decision of the President of the Common Assembly of the European Coal and Steel Community not to extend the contract of employment of the complainant, as a result of a decision of the officers of the Assembly concerning the re-organization of the secretariat of the Assembly which involved the abolition of several posts in the grade of the complainant. It was *held* that the complaint must be dismissed. The posts were in fact abolished. It was for the officers to decide how to organize the Assembly secretariat and which officials to retain in service in a reduced number of posts. The decision complained of was not arrived at irregularly and did not constitute disguised disciplinary action. The complainant could not claim the benefit of Staff Regulations which were not in force at the time his services were terminated. The indemnity awarded to him, which corresponded to the financial compensation which would have been payable under the Regulations, the draft of which was known to the officers, therefore constituted adequate compensation. [Report: *Recueil de la Jurisprudence de la Cour*, vol. II (1955–1956), p. 427.]

PART X

DISPUTES

A—ARBITRATION

I.—In General

ii.—The Law Applied by Arbitral Tribunals

Arbitration—Law Applied by Arbitral Tribunals—Refusal to Admit Claim Previously Dismissed by Decision of the Great Powers.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Counterclaim to Claim No. 4.[1]

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *infra*, p. 659.) This was a counterclaim by Greece in respect of 7/16ths of the profits of the concession taken by Collas & Michel in Cretan territory (see *Claim No.* 4, *supra*, p.81).

Held: that the claim must fail. The Great Powers had in the past refused to award the amount claimed to Crete, and the Tribunal would not now depart from that decision.

The Tribunal said: " What is being claimed on behalf of Greece by this counterclaim is in effect nothing but the allocation by this Tribunal to Greece of the monies which the Great Powers consistently refused to award to Crete from 1908 onwards, for the reason that the *status quo* in the matter must be maintained. (See, finally, their declaration of May 10, 1912,[2] and the comment in the *Mémoire* of the French Government dated March 15, 1937.[3]) Borel, the Arbitrator, in his award of April 18, 1925,[4] regarded those monies as having at all times had the character of revenue of the Ottoman Empire and, although they had not been actually paid to the Exchequer of the Imperial Government (having been attached by a group of creditors), they must at least have been credited to that Government.

" The Tribunal cannot allow itself to become involved in this controversy of the past. On the orders of the Great Powers, Collas & Michel paid the creditors, for the account of Turkey, and, in those circumstances, there can be no question of admitting the Greek counterclaim, the granting of which would amount to denying *a posteriori* the validity of an authoritative decision of the Great Powers."

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[1] See *supra*, p. 81.

[2] *P.C.I.J.*, Series C., vol. 82, p. 200.

[3] *Ibid.*, pp. 34–35.

[[4] In the case of *Ottoman Public Debt*: *Recueil des Sentences Arbitrales*, vol. I, pp. 544–556; *Annual Digest*, 1925–1926; Cases No. 57 etc. See also *infra*, p. 667.]

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 84.]

Arbitration—Law Applied by Arbitral Tribunals—Arbitration between Government and Foreign Company—Law Applicable by Arbitral Tribunal in Relation to Contract between a Government and a Foreign Company—Procedure Applicable—Contract for Supply of Goods to a Government—Legal Character of Administrative Contracts—Interdependent Contracts—Unpaid Loans and Supply Agreement—Effect on Duration of Validity of Agreement —Restrictive Interpretation of Administrative Agreements—Effect of Suspension of Supply Contract During War—*Force Majeure*—Unforeseen Circumstances and *Clausula Rebus Sic Stantibus*.

ALSING TRADING COMPANY, LTD. AND SVENSKA TÄNDSTICKS AKTIEBOLAGET *v.* THE GREEK STATE.

Python, Umpire.

Arbitral Award of December 22, 1954.

THE FACTS.—On June 30, 1926, the Greek Government concluded with the Alsing Trading Company, Ltd., a contract for the exclusive supply of matches to the Government's match monopoly for a period of " twenty-eight (28) years, beginning on the 1st of August, 1926, and expiring on the 31st of July, 1954 . . ." On the same day the Greek Government concluded a loan contract for one million pounds with Svenska Tändsticks Aktiebolaget (Swedish Match Company) which, together with Alsing, were components of the Kreuger Match Trust. If the loan were not placed at the Government's disposal within thirty days, the loan agreement " as well as that signed this same day with the Alsing Trading Company, Ltd., for the supply of matches " became voidable by the Government. The supply contract provided that its obligations jointly bound Alsing and the Swedish Match Company. In 1927, the Greek Government demanded additional consideration for the supply contract, and received, in 1930, a further loan of one million pounds from another Kreuger company, Kreuger & Toll. In 1932, Greece suspended payments on both loans. The supply of matches continued until the beginning of the Second World War. The war forced suspension of supply by Alsing for the period 1940–1946. In the latter year, deliveries were resumed. In 1953, in anticipation of the expiry of the supply contract on July 31, 1954, Alsing and the Swedish Match Company submitted to the Greek Government that the supply contract should be deemed extended beyond that date because (a) the loans had not been fully repaid and (b) deliveries had been suspended from 1940 to 1946 for reasons beyond the supplier's control. Upon the Government's rejection of this view, Alsing and the Swedish Match Company demanded arbitration, pursuant to the arbitration clause of the contract between Greece and Alsing. The arbitrators appointed by the Companies and the Government failing to reach agreement in proceedings that took place at Athens, the case was submitted for decision to the President of the Swiss Federal Tribunal, in accordance with the terms of the arbitration clause. The Umpire sat at Lausanne.

Held: that the contract could not be deemed to be extended.

With respect to the law applicable to the merits, the Umpire held that, since proceedings had begun in Greece, it was Greek private international law, as the *lex fori*, that was to govern these proceedings. The subsequent appointment of a foreign Umpire sitting abroad did not mean that the applicable law was to be re-determined by other rules. Greek law respected the autonomy of the parties. According to it, even during the course of litigation itself the parties might agree to apply a particular law; and, the Umpire found, in the instant case they had agreed to apply Greek law. Moreover, he noted, the parties agreed that, " given the interdependence and the common source of the systems of law in force in continental Europe, the question of the law to be applied is rather a question of principle without much practical significance ". With respect to the applicable procedure, the Umpire held that the proceedings had the character of " an international arbitration in the sense of the Protocol relating to Arbitration Clauses of September 24, 1923 ". According to that Protocol, the procedure was to be governed by the will of the parties and, secondarily, by the law of the State in whose territory the arbitration took place. Thus the Umpire held that the rules of procedure agreed upon by the parties governed, and that the Swiss federal law of civil procedure governed matters not determined by those rules.

The Umpire granted the Greek motion that the Swedish Match Company be severed as a party plaintiff, noting that it was party neither to the supply contract with Alsing nor to the arbitration agreement. The fact that, " from the economic point of view," Alsing and the Swedish Match Company " belong to the same group does not mean that they do not constitute juridically separate companies ". A decision in the case could not compromise the Swedish Match Company's legal—as contrasted with economic—rights.

The supply contract was " not a concession in the sense of administrative law ", since Alsing was not entrusted with the management of a public service or the operation of a monopoly. However, the supply contract was administrative in character, Greek law, the

Umpire holding, making the distinction found in French law between administrative contracts and contracts of private law. " But except for rules inherent in the fact that the supplier assists in the running of a public service or in the operation of a monopoly, the supply contract is subject to the general principles of the law of contracts. . . . Even administrative contracts must be interpreted according to the norms of private law and by application of the principles of good faith . . . nothing therefore prevents the Umpire from having recourse to Roman-Byzantine law—*i.e.*, essentially to common law—in order to determine the sense and scope of the supply contract."

Holding that the contract at bar did not commit Greece to taking any fixed quantity of matches, the Umpire found that the contractual period was a *tempus continuum*, not a *tempus utile*. Thus it was to terminate on the date it prescribed, even if Alsing had not been able to deliver quantities anticipated as corresponding to the monopoly's requirements for 28 years. This result was not altered by the failure of Greece to repay the loans. While it was " indisputable " that there was a " certain relationship " between the supply contract and the loan contracts, the " interdependence " of what the Umpire described as " combined contracts " did not necessarily relate to the duration or termination of their effects. Greece, the Umpire found, did not explicitly agree that the supply contract should remain in force until the loans were repaid. " . . . [In] administrative contracts," he held, " it is only with extreme reserve that the judge can base his judgment on the parties' tacit consent to impose on the State obligations which do not spring from the text of the agreement which it signed . . ." In the instant case, it was " inconceivable that the Greek State should have undertaken in advance to take delivery of matches beyond the period of 28 years, should it happen that a part of the loan was not to be repaid. A contract of such long duration already considerably limited its freedom of action." Doctrine concerning combined contracts had never admitted the extension of an expiring contract until the other had been fully carried out.

The Umpire further held that a six-year extension was not justified. Impossibility of performance during the war years released both parties. Alsing was not to receive the additional compensation of supplying matches for the six years during which the parties were reciprocally freed of their obligations.

These conclusions, the Umpire declared, did not yield to the application of the *clausula rebus sic stantibus*. Finding that doctrine present in Greek, Swiss, German and French law, the Umpire held that it was of no assistance to Alsing. While suspension of the loan payments had altered the economic considerations in the light of which the Kreuger group had contracted, it was " hardly possible " to allow that the suspension of loan payments was " quite unforeseeable ". Greece was in financial difficulties when the contracts were concluded. " . . . [In] long term contracts, the parties must reckon with rather considerable fluctuations due to public disturbances whose origin cannot be foreseen." Moreover, the claims flowing from the loan agreements susbsisted, and Alsing had made its profits on the match sales for all but six years—a period not " disproportionate to the risk which the contract held for Alsing ". Even were reformation of the contract justified, the Umpire concluded, " a court has never been known to extend the duration of . . . a contract in order to restore the balance of reciprocal obligations."

The Umpire said: (I) *The law applicable by an arbitral tribunal in relation to a contract between a Government and a foreign company.*—

" 1. Before the two arbitrators sitting at Athens, the defendant State maintained that the law applicable to the suit was Greek law. It stated as follows:

' According to Article 6 of the civil law of 1856, the effects of obligations are governed by the law of the place where they should be fulfilled according to the express or tacit intention of the contracting parties, unless the contracting parties have themselves agreed on the law to be applied. On the one hand, the formal wish of the parties was that the supply contract would be performed in Greece; on the other hand, the Treasury being a party to the contract, the contracting parties are supposed to have subjected to Greek law; finally the parties are not in agreement to apply a foreign law. But even if Article 25 of the Greek civil code of 15th March, 1940, were applied to the suit with effect from 24th February, 1946, the solution would not be different. According to this provision " the obligations resulting from a contract are ruled by the law to which the parties have subjected; in default of the related provisions, the law is applied which is the most suitable to the contract in view of all the special circumstances ".'[1]

" In this respect the fact that the Treasury is party to the contract is also decisive; to that add that the agreement was concluded in Greece, that it was to be fulfilled in this country, that the arbitration was to take place and to be carried into effect in Greece.

" When Alsing explained themselves on this subject in this first Athens memorandum, they stated, although formulating certain reserves as to the merits of the State's argument, that it was not opposed to the suit being adjudicated according to Greek law. They reserved the right, however, to come back to the question should an umpire be appointed.

" In its supplementary memorandum of 31st August, 1954, addressed to the umpire, as well as in the speech of its counsel, Mr. Carabiber, the defendant State maintained its argument.

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[1] Savidis X., *The New Greek Civil Code*, Athens 1940; Gogos, *Das Zivilgesetzbuch von Griechenland* (*Greek Civil Case Law*), Berlin, 1951:

" The obligatory relationships arising from a contract are governed by the law to which the contracting parties have submitted. In default of such the law is applied which is the most suitable in view of all the special circumstances."

" In their memorandum of 30th August, 1954, as in the oral pleadings, the plaintiffs admitted that Greek law is applicable to the suit. They would, however, wish to limit the scope of application of this law ' to the legal provisions, specific and unquestioned ', as the umpire could not be called upon to settle ' controversial questions in the doctrine and the jurisprudence of the country '.

" 2. The arbitration having been agreed upon in Greece in conformity with the arbitration clause figuring in Article 10 of the supply contract, it is Greek private international law, as ' lex fori ', which is called in to determine the competent law. It is true that the parties submitted, in case of disagreement between the two arbitrators appointed, to the decision of a Swiss or Dutch umpire. But in so doing they did not accept that at this stage of the arbitration proceedings the law applicable be redetermined according to the national rules of international private law of the judge now called upon to settle the dispute without appeal, whose nationality was not yet certain. It is not conceivable that in the same trial the law to be applied to the main issue, if this be the case, could change during the suit.

" In this particular case, at the time that the supply agreement was concluded, the parties did not make a declaration as to the law to which this contract should be subject. This agreement would have been decisive with regard to both Article 6 of the Greek Law of 1856 and to Article 25 of the Greek Civil Code of 1940, which both confirm the principle of the autonomy of the parties in matters of contract. On the other hand, the plaintiffs accepted before the arbitration tribunal that the case be judged according to Greek law, as requested by the defendant; the reservations which they made do not affect this acknowledgement.

" The parties admit—the defendant, explicitly (*cf.* special memorandum, page 18), the plaintiffs, implicitly—that in Greek private international law the pleaders may still during the trial itself agree as to the law to be applied. This conception was not supported in the action by quotations from authors or abstracts of jurisprudence and the Greek jurists consulted did not express any opinion on this subject. But according to a principle generally admitted in civil proceedings, particularly in Switzerland, if the parties do not provide justification of the rules of foreign law which they invoke, the judge is entitled to pronounce in accordance with his national law (*cf.*, for example, CPC Vaudois, Article 127, and Guldener, *Das Schweizerische Zivilprozessrecht* (Swiss Civil Case Law) I, pages 109–110, note 11). According to recent jurisprudence of the Swiss Federal Court the parties may choose the applicable law even during the trial (RO 79, II, 295; 80, II, 45 and 49).

" Consequently the umpire is justified in applying Greek law to the suit without having to make a statement as to what law would have been applicable, in default of agreement between the parties, under the rules of conflict laid down in Greek private international law.

" 3. As to Greek law applicable *ratione temporis*, Article 24 of the introductory law of the Greek Civil Code provides (according to Gogos' German translation):

> ' The obligations deriving from any cause whatever resulting from facts arisen before the introduction of the civil code, remain subject, after this code has come into force, to previous law, particularly as regards birth, tenor, effect, " mora " of the debtor or of the creditor, right of termination, consequences of an unforeseeable change in the basis of the contract, impossibility of performance, fault and evidence.'

" As a result—and the parties are in agreement on this point—the dispute comes under Roman-Byzantine law which was reintroduced into Greece by Decree of 23rd February and 7th March, 1835, after liberation from Turkish domination.

" The reservations formulated by the plaintiffs on the application of this law by a Swiss judge may only be considered to the extent that the parties will not have supplied the necessary justification. For the rest, note is taken of the defendant's declaration—[agreeing with] the plaintiff's opinion—according to which, ' taking for granted the interdependence and the common source of the legislations in force in Continental Europe, the question of the law to be applied is on the whole a question of principle not having much practical significance '." (At pp. 29–32.[1])

(II) *The procedure applicable.*—

" 1. The dispute which the respective arbitrators of Alsing and the Greek State, in agreement with the parties themselves, submitted to the umpire by virtue of Article 10 of the supply contract has the character of an international arbitration in the sense of the Protocol relating to arbitration clauses of 24th September, 1923, to which Great Britain, Sweden, Greece and Switzerland are parties. According to Article 1 of this Protocol ' each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different contracting States by which the parties to a contract agree to submit to arbitration all of any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.' Greece has reserved the right, in conformity with the second paragraph, of limiting to the contracts which are considered commercial by its national law, the undertaking meant in the first paragraph. But this reservation is of no avail in this particular case, whatever be the nature of the supply contract, as the competent Greek authority has approved arbitration in conformity with the rules of its internal legislation.

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[1] References are to the pages of the duplicated text of the Award.]

" 2. According to the terms of Article 2 of the Protocol relating to the arbitration clauses, the arbitration procedure including the constitution of the arbitration tribunal is governed by the will of the parties and by the law of the State in whose territory the arbitration takes place.

" In the case under review, rules for the arbitration procedure were laid down by the parties first in the arbitration clause contained in Article 10 of the supply contract, then in the Rules of procedure adopted on 13th May, 1954, at Athens, and finally in the Rules of arbitration procedure established by the arbitrators for the umpire and ratified by the parties. According to the last act, the umpire received the power to amend, complete, and interpret the rules proposed by the parties.

" The law of the State in whose territory the arbitration takes place (Article 2, paragraph 1, of the Protocol) is the Vaudois Code of Civil Procedure. As the Federal Court would not have been competent on the main issue (Article 1 PCF, ATF 78 I 361), the law of federal civil procedure of 4th December, 1947, does not regulate arbitration and the proceedings take place at Lausanne. However, the territorial law only applies in a subsidiary way, according to the Protocol, for lack of provision made by the parties and the arbitrators commissioned by them. In this respect the conventional rules of procedure are only here to make law, in particular for the duration of the arbitration (excluding Article 508 VCCP), for the recording of arbitrational judgment (excluding Article 515 VCCP: *cf.* below, Preamble IX), and for opening up means of recourse (excluding Article 524 VCCP). Indeed, in the international arbitration coming under the Protocol, even the imperative provisions of the internal law should give way to the will of the parties (*cf.* Max Guldener, *Das Internationale und Interkantonale Zivilprozessrecht der Schweiz* (*Swiss International and Inter-cantonal Civil Case Law*), Zürich 1951, page 162, notes 178 and 180; *Journal des Tribunaux*, vol. 97, III, 123). As for the procedure applicable to the inquiry and to the decision, the umpire, acting by the power conferred upon him by the parties and considering that in the present stage of arbitrational procedure the case is one of the exclusive competence of a Swiss federal judge, exercising his powers in Switzerland, decided to apply the federal law of civil procedure to all questions not governed by the rules set by the parties.

" 3. According to the decision taken by the umpire, the law of federal civil procedure is particularly applied to the administration of evidence by witnesses, to wit to the capacity to give evidence (no challenge taken from the Greek Code of Civil Procedure being admissible), as well as to the lines followed by the hearings. The same applies in principle to the appreciation of the probative value of the evidence given, which depends in federal civil procedure on the judge's free conviction (Article 40 FCP). . . ." (At pp. 32–36.)

(III). *Contract for supply of goods to a Government. The legal character of administrative contracts.*—

" 1. *Legal character*

" By virtue of Article 1 [of the supply contract of June 30, 1926],

> ' the Government concedes to the company the exclusive supply of any quantity of matches required both by the Greek Monopoly of Ancient Greece, Modern Greece and Western Thrace, and by the consumption in general of the country for a period of twenty-eight years, beginning on 1st August, 1926, and expiring on 31st July, 1954 . . .'

Article 2 provides for the manner in which the price is fixed. Article 3 lays down the methods of verification; Articles 4 and 6 specify the quality, dimensions, packing and labelling of the merchandise. Article 5 sets out the conditions of payment. Article 7 indicates the specifications to be given by the Government and Article 8 the consequences of a delay by Alsing. Article 9 concerns the deposit to be paid by the company. Article 10 contains the arbitration clause. Article 11 reserves for Alsing the right to assign its rights. Article 12 includes the joint liability of STAB [the Swedish Match Company] and Article 14 the acceptance by Alsing of Article 5 of the loan agreement concluded with STAB. Article 13 refers to the cases of *force majeure*. Article 15 gives priority to the French text and Article 16 refers to the ratification of the agreement by Decree-law and to its coming into effect.

" (a) In spite of the terms of Article 1 (' the Government concedes . . .'), the agreement concluded by the Greek State with Alsing is not a concession in the sense of administrative law. The State did not entrust to the plaintiff the management of a public service, to be run at the plaintiff's expense, risk and peril (*cf.* Waline, *Manuel Elémentaire de Droit Administratif* (*Elementary Manual of Administrative Law*), 6th ed., 1950, page 380; Duez and Debeyre, *Treatise on Administrative Law* (*Traité de droit administratif*), 1952, page 554). It did not either give it a contract for the working of a fiscal monopoly in matches, which might also have constituted a concession. But the State made Alsing promise the delivery of matches in view of the State's exploiting its own monopoly.

" The agreement of 30th June, 1926, may be either a contract in private law or a supply agreement depending on administrative law. The plaintiff does not deny that in spite of the differing opinion of Maridakis (*Thémis*, 55, page 37), Greek jurisprudence and doctrine admit the distinction made in France between administrative contracts and contracts in private law (*cf.* Alsing's first memorandum of 17th May, 1954, pages 20–21).

" The supply agreement is an administrative contract having as object the delivery for a certain period of time to an administrative person of movable objects, in conditions different from private law, on condition of pecuniary remuneration, and at the risk and peril of the supplier (*cf.* Waline, *op. cit.*, page 565; *Berthélemy, Traité Elémentaire de Droit Administratif,* 13th ed., 1933, page 593; Duez et Debeyre, *op. cit.*, page 890). The administration can also provide for the consumption required by its services by concluding private agreements with the suppliers. The fact that it does not intend to enter into a contract of civil law or of commercial law is recognizable by the presence in the agreement of clauses imposing on the supplier obligations or penalties which fall outside the orbit of common law. The features whereby jurisprudence recognizes a supply contract are: the stipulation of special conditions of performance, the existence of specifications, the more or less prolonged participation of the supplier in the execution of a public service (Waline, *op. cit.*, pages 620–621).

" In the present case, there is reason to consider that the State commissioned a single supplier to furnish for a period of 28 years the matches required by its monopoly. Alsing thus found themselves very closely associated with the running of the administration in question. Their position was therefore relatively dependent on the Government. . . .

" (b) The consequences of the administrative character of the supply agreement are in French law, *inter alia,* the following:

" The public authority has the right to cancel the contract, subject to indemnifying the supplier (Berthélemy, *op. cit.*, page 593; Duez et Debeyre, *op. cit.*, page 909). In case of doubt over the meaning of the clauses of the contract, they should be interpreted by reference to the general principles of administrative law; the jurisprudential theory of unforeseeability may thus be applied to contracts of long duration (Waline, *op. cit.*, page 567). The law-suits to which supply contracts give rise fall under administrative jurisdiction (Berthélemy, *op. cit.*, pp. 593–595)—a rule which moreover has no bearing on this case, since the dispute was regularly submitted to arbitration jurisdiction. Furthermore, in Greece, the Treasury does not assume responsibilities except by virtue of written and specific declarations made by their competent agents within the limits of their authority (Articles 35 and 40 of Law CCXII of 1852 regarding public accounts, judgments delivered by the Supreme Court of Athens Nos. 296/1931, 320/1931, 216/1936).

" But except for rules inherent in the fact that the supplier assists in the running of a public service or with the exploitation of a monopoly, the supply agreement is subject to general principles of the law [on] contracts. In their first memorandum, the plaintiff quoted, without being contradicted, the opinion of the State's legal Counsel (No. 3348/1928, *Thémis*, 41, p. 236), according to which even administrative contracts should be interpreted according to the norms of private law and by the application of the principle of good faith. The above reservation being made, nothing therefore prevents the umpire from having recourse to Roman-Byzantine law —*i.e.*, essentially to common law—in order to determine the sense and bearing of the supply agreement. . . ." (At pp. 39–42.)

(IV). *Interdependent contracts: unpaid loans and supply agreement. Effect on duration of validity of the agreement. Restrictive interpretation of administrative agreements.*—

" 1. The plaintiff maintains that the two agreements of 1926 are ' indissolubly bound one to the other by a series of provisions '; that the two agreements in fact only formed one and that ' the Greek Government's true co-contracting party was in reality the Kreuger group '; that in its turn the loan agreement of 1930 ' forms a whole with the two first ones ', as the loan made by Kreuger and Toll was only an ' additional consideration to the agreement concerning the supply of matches ' (Maridakis, p. 5). As a result, the two contracts or groups of contracts—the supply agreement and the loan agreements—could not but end simultaneously; in other words, the supply agreement would remain in force beyond the contractual period of 28 years, until the loans were entirely repaid as to principal and interest.

" On the other hand, the defendant State maintains that the loan agreement and the supply agreement, once concluded, would in principle have nothing further to do with each other; that between them there would be no further bonds of interdependence beyond those resulting from special clauses of these agreements.

" 2. It is indisputable that there is a certain relationship between the supply agreement and the loan agreement. In order to decide between the conflicting theses, it is necessary to specify the nature of this relationship.

" Two or more contracts may first be bound one to the other in a purely external manner: they result, for example, from the same exchange of correspondence or are recorded in the same document. Each of these contracts is self-sufficient and neither depends on the other. This apparent or fortuitous bond has no legal bearing: every contract is only subject to its own rules as regards its conclusion and effects.

" But two or more contracts may also be bound in such a way that one depends on the other in one respect or another. The link is then internal and it is called a *combination of contracts* (*Vertragsverbindung*) or combined contracts, as opposed to the mixed contract which constitutes a single agreement, but comprising elements taken from various contracts (cases of combined contracts in Swiss law: ATF, 63, II, 414; 67, II, 125, 221; 78, II, 32, 81; *cf.* Oser-Schönenberger, *op. cit.*, vol. II, notes 7–9, Articles 184–551 CO; Becker, *Kommentar zum schweizerischen Obligationenrecht*, notes 14–16, in Art. 82; R. Weiss, *Die Rechtsverhältnisse beim gemischten Vertrag nach schweizerischem Obligationenrecht* (Legal Relationships of a Mixed Contract according to Swiss Law of Contract), Berne Thesis, pp. 32–33; F. Leonhard, *Schuldrecht* (*Law of Contract*), I, 1929, p. 323 *et seq.*); Enneccerus-Lehmann, *Schuldrecht*, 14th ed., 1954, section 100, p. 384

" Each of the combined contracts—for example, a sale and a loan, a lease and a work contract, a supply contract by successive deliveries and a relationship of exclusive representation—is in itself complete. If synallagmatic contracts are concerned, each one presents a couple of reciprocal obligations: in the combination of a sale with a loan, for example, one has, on the one hand, obligations for the seller and obligations for the buyer, and on the other hand, obligations for the lender and obligations for the borrower and each couple of obligations obeys the rules peculiar to bilateral contracts (Articles 82, 83, 107 *et seq.*, 119 CO). But, furthermore, the parties desire that the two contracts which are in themselves self-sufficient, be concluded with a certain amount of interdependence in such a way that they form a whole; for them, only the conclusion of the whole agreement comprising the two contracts should ensure the correct balance of mutual performances. Thus the interdependence of the obligations, characteristic of the synallagmatic contract and manifested here in each contract, is accompanied by interdependence of the contracts themselves, resulting in their being coupled by the parties.

" The relationship existing between two or more contracts may be of a different nature. The parties are free to dispose in this respect. The dependence may be reciprocal (each contract depending on the other) or only unilateral; it may concern the making of contracts, the duration or cessation of their effects.

" 3. In the case in question, the supply contract and the loan agreement of 1926 were concluded in consideration of each other. It is true that they were the objects of two distinct acts. But this does not in any way preclude that the contracts which they embody are linked (*cf.* Enneccerus-Lehmann, *loc. cit.*). This is the result of all the circumstances taken together and of the actual contents of the contracts. . . .

" 4. But the point is to know whether, beyond the stage of their formation, the supply contract and the loan agreement (whereby will be henceforth understood the two loan agreements) should retain their interdependence to such an extent that one could not cease its effect before the other.

" (a) The plaintiff maintains that the exclusive right of supplying matches for the Greek monopoly was promised them ' until total repayment of the loan '. But there is no trace to be found anywhere of an express agreement in this sense.

" Alsing mentions a formal assurance which General Pangalos was supposed to have given to Missaélidès at the time of the Eleusis interview of 23rd May, 1926, but the fact was not established. The witnesses heard by the umpire insisted on the importance of this meeting, saying that they had learned that General Pangalos was disposed to grant the exclusive rights of the supplies on condition of a loan being granted *and* during the term of the loan. However, whatever be their convincingness with regard to Greek law (above, consideration II[1]), these testimonies may simply mean that the duration of the deliveries was fixed according to the time required to repay the loan. If General Pangalos's remarks had had the significance attributed to them by the plaintiff, Missaélidès would not have failed to refer to them in his confirmatory letter of 24th May, 1926, to the person he saw the day before. In this letter there is no question of exclusive rights which would have been ensured until the loan was fully repaid; Missaélidès mentions only an exclusive supply for twenty years and a security fulfilling the office of a loan, which would be effected for the duration of the contract (*viz.*, 20 years, subsequently extended to 28 years). Among people experienced in business, a corroborative letter of this kind would be considered sufficient evidence.

" Neither the press reports appearing at the time nor publications by financial journals (*cf.* plaintiff's memorandum of 30th August, 1954, Nos. 32 and 33), establish the existence of a clause according to which Alsing would have the right to supply matches until the day when the loan would be fully repaid. If passages are found in these texts to the effect that the company obtains ' the exclusive right to import matches, for a period equal ' to the duration of the loan (' Proia ', of 2nd July, 1926), ' that during the term of this loan Alsing would have the exclusive right to supply matches ' (*Kimber's Record*), that ' the loan of £1,000,000 would be completely repaid before the expiry of the contract ' (report of STAB's Board of Directors of 5th April, 1927), there is no question here of short cuts to express the idea that a supply contract and a loan agreement are concluded for the same number of years, *viz.*, for 28 years, ending 31st July, 1954. When informing their readers, the authors of these reports obviously did not think for one moment of the possibility that the action of these two agreements might not develop in the normal way.

" (b) However, although the plaintiffs could not invoke a specific clause to support their argument, it is appropriate to examine whether the provisions regulating in the same way the expiry of the contracts reveal the tacit will of the parties to make the deliveries go on until the sums lent are fully repaid. According to the plaintiffs, the facts that the supply contract and the loan agreement were concluded for the same period of 28 years ending on 31st July, 1954, and that, in 1930, the same maturity date was decided for the new loan, do not imply that the deliveries would have to cease and the loans be repaid on 31st July, 1954; in fact, the parties would have

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[[1] At p. 32 (see *supra*, pp. 636–638).]

wished to show by this that the loan and the supply were to last the same length of time.

" But, in the first place, in the administrative contracts, it is only with extreme reserve that the judge can operate with the parties' tacit consent to impose on the State obligations which do not spring from the text of the agreements which it signed (*cf.* Fleiner, *Institutionen des deutschen Verwaltungsrechts—Institutions of German Administrative Law*, Section 13, note 32). Then, whatever be the outcome of the above, the declarations of intention should be interpreted in the sense that the party to whom they were addressed could reasonably attribute to them (theory of confidence, ATF, 64, II, 10).

" But none of the parties could attribute to the clauses concerning the terms the meaning that one contract would not cease its effects before the other, should delays arise in the execution of one of them. Particularly, it is inconceivable that the Greek State should at the outset have undertaken to take delivery of the matches beyond the period of 28 years, in the contingency that one party to the loan should not be repaid. A contract of such long duration already considerably limited its freedom of action. . . .

" (d) From what has been set out under letters (a) and (b), the result is nevertheless that the parties did not consider either expressly or tacitly that the non-performance of the loan agreements would have the effect of prolonging the duration of the validity of the supply contract beyond the term stipulated in the contract. Even if it was admitted that an omission was involved, the judge called in to repair it, after taking into account the circumstances as a whole and the rules of good faith, would not bring himself to prolong the supply agreement on the grounds that the loan contract was not entirely repaid within the same period expiring on 31st July, 1954. Prof. Maridakis, consulted by Alsing, himself rejects the idea of automatic extension of the supply contract (pp. 5 and 6 of his opinion of 29th June, 1954).

" In fact, until now doctrine and jurisprudence have solely admitted as regards combined contracts and unless otherwise agreed that if one of the contracts were to end prematurely during the common duration, the other would also lapse. So far they have never ascribed to the combination of two contracts the power to create new obligations for one party, let alone the power to extend the existence of a contract which has expired, until the other has produced all its effects.

" On the other hand, the match monopoly in Greece represents a considerable source of revenue to the State. The yield of this monopoly depends essentially on the price at which the Treasury acquires the matches. In order to secure the most favourable conditions, the State should be able to profit from competition between the manufacturers. By undertaking to take Alsing as supplier for the singularly long period of 28 years, the State deprived itself of a valuable advantage. Being clever traders, Alsing and STAB could not be unaware of the sacrifice which the Treasury was making to secure the loan. Consequently they could not have supposed or expected that the State would consent to an extension of the supply contract beyond its contract term, should the case arise that the repayment would suffer a delay resulting in the loan agreements not losing their effect on expiry of the delivery period.

" Furthermore, if it were to be recognized that Alsing had the right to supply matches until full repayment of the loans, the State would be saddled with an obligation to take delivery for an indeterminate period. In view of the financial difficulties with which Greece was contending particularly after the Second World War and as a result of post-war difficulties, the Greek State will for a long time not be in a position to repay fully the principal and interest of the loans (not to mention the interest on overdue payments). In its former jurisprudence the Swiss Federal Court had admitted that obligations to take delivery of merchandise contracted for for an indeterminate period are contrary to custom and therefore null (ATF, 25, II, 450 *et seq.* and 473 *et seq.*; 26, II, 120). Now the Federal Court holds that they are immoral when there is reason to admit in connection with the particular circumstances of the case, that by this engagement the buyer restrains his liberty of economic action in a manner contrary to good custom (ATF, 67, II, 225; *cf.* Staudinger, *Kommentar zum deutschen B.G.B.—Commentary on the German Civil Code*, 10th ed., I, p. 708). This condition has certainly been realized in the case in question, if the particular character of the supply contract is taken into account in which good management of the public service exacts that as far as possible, the authorities have freedom of action. No doubt the Treasury should in any case acquire matches and could obtain them from the plaintiffs at a price which was slightly less than the world price in a certain number of countries. But it follows from the indications given by the plaintiffs themselves that East European countries are in a position to supply Greece with much cheaper matches. The extension of the supply contract would therefore entail great disadvantages for the defendant.

" The plaintiffs propose alternatively that the Umpire fix a period within which the supply contract should be executed. But, independently of the reasons against any extension of the contract, the judge would not have any basis on which to fix the number of years during which the contract would remain in force owing to the fact that the loans were not reimbursed. Any decision in this connection would be arbitrary.

" 5. Consequently, the plaintiffs cannot claim to base on the interdependence of contracts the right to supply matches to the defendant beyond 31st July, 1954.

" The interdependence of contracts, which is indisputable as regards origin, could have produced other effects during their performance. Thus, in the case that one of the contracts should prematurely cease to exist by reason of the ' mora ' of one of the parties, it is possible to contemplate that the co-contracting party would have had the right to demand the termination of the other contract. But the interdependence is not absolute The supply contract and the loan contract each entails its particular risks and any event occurring during the execution of one of them does not automatically have any repercussion on the other. For example, if Alsing, as a result of ' force majeure ' or their bankruptcy, had not been in a position to continue to supply during the period provided for, the result would not have been that the loan contract would have been annulled. Similarly, if the debtor of the loan, by reason of his temporary or permanent insolvability [insolvency], does not find himself able to repay all the amounts lent on expiration of the contract, the consequence is by no means that the supply contract is extended for an indeterminate period." (At pp. 44–55.)

(V). *Effect of suspension of supply contract during the war.* Force majeure.—

"1. Whether interpreted for itself (IV 2 above),[1] or considered in relation to the loans (V)[2], the supply agreements of 30th June, 1926, expired on 31st July, 1954. The plaintiffs, however, claim that even if this is the case, the contract should be extended for six years, *i.e.*, for the period during which it was not performed in the course of the years of the war and thereafter (1940–1946).

" The defendant first opposes to this claim the plaintiffs' waiver resulting from the correspondence exchanged between the parties in 1945 and 1946 and from the agreement signed on 15th July, 1946. The defendant then disputes that the stoppage of deliveries during the critical years has had the effect of suspending the course of the contract.

" 2. The Greek State invokes the non-suit clause appearing under Fig. 3 of the agreement of 15th July, 1946, which settled the questions outstanding between the parties (above, *Facts*, No. 23 [p. 20 of duplicated text of Award]). According to the defendant this clause also aims at the suspension of the execution of the contract for the duration of the occupation. In fact, this question had been set aside by Alsing at the same time as that of the licence duty of 5½%, in a letter of 1st May, 1946, following on a letter of 30th April in which the plaintiffs' representative specified the questions to be settled before deliveries were to be resumed. But in their letter of 31st May replying among other things to Alsing's letter of 1st May, the Ministry of Finance, informing the plaintiffs of the Legal Counsel's decisions, added:

[1 At pp. 42–44.]

[2 At pp. 44–55 (see *supra*, pp. 642–647).]

'Regarding the question of suspension . . . which you raise with the obvious intention of securing the extension of the contract in question beyond 1954, we are of the opinion that no discussion is possible.'

" The agreement was signed thereupon on the 15th July, 1946 (*cf. Facts*, Nos. 21–23 [pp. 17–20]).

" The waiver clause does not have the significance attributed to it by the defendant. In their letter of 9th May, 1946, the Ministry of Finance only submitted to the legal Counsel the questions raised by the plaintiffs in their letter of 30th April, 1946 (value of the matches delivered in 1940 and 1941, difference in freight, insurance premiums against war risks, interest on overdue payments, delivery of matches to the Greek Consul General at Constantinople, claim regarding an order placed with Solo); all these differences ' pending for a long time ' concerned the application of the contract during the preceding years; Alsing's letter of 1st May was therefore not sent to the legal Counsel. The latter pronounces ' on the differences existing with the company as set out in detail in the letter from the Ministry of Finance '; it mentioned for example as point of dispute to be included in Alsing's renunciation the difficulty relating to the matches supplied to Constantinople (a question which was moreover later reserved at Alsing's request). There is nowhere a question of any continuation of the contract beyond 1954. This is understandable: Alsing's representative had only raised the problem in their letter of 1st May, 1946, reserving the right to come back to it later after having completed their information and received the company's instructions: they had as yet made no claim in this connection.

" It is therefore at the very least doubtful whether this question, which was then quite new, was incorporated in the waiver clause. If in their letter of 31st May, 1946, the Ministry declare that Alsing's point of view on the subject ' could not form the subject of discussion ', they may have intimated thereby that they found it groundless and that they would set aside any subsequent request for extension of the contract, but not that they intend to see Alsing give up making such a request here and now. The plaintiffs could hardly think that by omitting to formulate a reservation on this point before signing the waiver clause, they lost the right to avail themselves of the suspension of its performance during the war years 1940–1946. It is not possible to presume in this way the renunciation of a right (Regelsberger, *op. cit.*, Section 123, pp. 452–453). Finally, there is reason to point out that the legal Counsel accepted in 1947 to reconsider the question of the licence duty claimed from the plaintiffs on the deliveries of matches, even when the Ministry of Finance in the same letter of 31st May, 1946, to which the State refers into account, had rejected Alsing's reservation on this subject.

" Consequently the plaintiffs still have the right to plead for an extension of the supply contract which expired in principle on 31st July, 1954.

" 3. In support of their thesis, Alsing allege as pleas: the delay of which the State was guilty, and the principle that '*force majeure*' would interrupt the term of limitation.

" (a) As regards at least the years 1944 to 1946 and the period from 1st March [to] 1st August, 1940, the plaintiffs maintain through the medium of their consultant, Prof. Triantaphyllopoulos, that the Treasury omitted to give the decision provided for by Article 7 of the supply contract, that this omission is due neither to a random case nor to '*force majeure*', that as a result it puts the Treasury in a state of '*mora accipiendi*' (for having refused to perform a preparatory act) and also of '*mora solvendi*' (the buyer being obliged to specify his needs).. It would follow that Alsing could demand from the purchasers in arrears the subsequent execution of the performance, so that the delivery would have to be put off for 3 or 4 years after 1954. The plaintiffs could make the same request by entering the field of damages, the reparation of damages being ordered by the judge in the form of an extension of the contract.

" It is not necessary to examine whether the '*mora*' and the fault of the State were effective and whether in this case they could have the results attributed to them by Alsing. In fact, by the agreement of 15th July, 1946, the parties settled their differences which had arisen between them as a result of the war and its aftermath. Just as the State cannot find an argument in any possible breach of promise on Alsing's part, so the plaintiffs cannot avail themselves of any failure on the part of the defendant to fulfil its obligation of giving the specifications required by Article 7 of the agreement. Therefore, the plaintiffs have forfeited the right to invoke the '*mora*', even in fault, of the defendant to secure '*a posteriori*' execution of the contract.

" (b) The supply agreement concluded by Alsing with the Greek State did not oblige the latter to receive a determinate quantity of matches of which the delivery would have been spread over 28 years. The plaintiffs had simply to cover the requirements of the match monopoly from 1926 to 1954 (*cf.* above, IV 2). We are touching on what German doctrine calls a 'Bedarfsvertrag' (contract aiming at satisfying given requirements; *cf.* Oertmann, in *Ehrenberg, Handbuch des gesamten Handelsrechtes*, Commercial Code, IV 2, p. 345; Vetsch, *op. cit.*, p. 11), *i.e.*, a 'Bedarfsvertrag' in the literal sense, since the contract does not fix a minimum amount of which the State should take delivery. In a contract of this kind the buyer's obligation to obtain merchandise depends on his need for it, which may diminish or disappear as a result of the circumstances (case of the restaurant situated in an area to which access was forbidden by the military authorities; *cf.* Wüthrich, *Der Bierlieferungsvertrag, The Beer Delivery Contract*, Zürich thesis, 1929, p. 14). In the case under dispute the Greek monopoly did not cease to require matches during the years 1940–1946. But it was impossible for it, according to what the plaintiffs admitted by signing the agreement of 15th July, 1946, to be supplied by Alsing. The result is the same, however. The State's obligation to perform the contract was extinguished for the period under consideration by reason of the impossibility of taking delivery ('*impossibilium nulla est obligatio*'), and the monopoly legitimately covered its match requirements by going to other suppliers. Just as if the demand as such had entirely or partly disappeared, the plaintiffs cannot demand that the State buy after the event the amounts of matches which it had already procured elsewhere.

"On the other hand, even in a sales contract with successive deliveries turning on a certain quantity of goods, the impossibility of performing one or more deliveries frees the debtor as regards these performances, without his being obliged later to deliver or take of the quantities in question. Each delivery in a contract of this kind constitutes the performance of a distinct obligation which may be extinguished for its own reasons (Oser-Schönenberger, note 19 to Article 184 CO; Hürlimann, *op. cit.*, p. 9). No doubt, in order to admit the impossibility of one of the successive performances, an obstacle opposing it momentarily and of which the disappearance seems possible would not suffice; the performance is then only delayed. But it is considered impossible as soon as it is not possible to foresee the duration of this obstacle (*cf.* Von Tuhr-Siegwart, Section 68, I, p. 537). This was the case of the obstacles which naval warfare, the occupation of Greece and the difficulties of post-war years imposed on the performance of the supply contract. This being the case, Alsing's claims tending to acceptance and payment of the periodical deliveries of the years 1940–1946 were extinguished; they did not arise again owing to the fact that in the course of time performance became possible again in itself (Von Tuhr-Siegwart, *loc. cit.*; *Reichsgerichtentscheidungen*, *Supreme Court's Findings*, 89, page 206; 90, page 102; 105, page 388).

"All the same, this solution is that very one following from Article 13 of the supply contract. According to this clause, 'the cases of '*force majeure*' release the company from all responsibility'. In the impossibility in which it found itself as a result of the circumstances due to the war, of getting through to the Greek State the goods which were the object of the contract, Alsing was relieved of the corresponding obligations. By this very fact, in conformity with the general rule regarding synallagmatic contracts, the defendant's obligation to receive and pay for the deliveries was also extinguished, as the rule '*periculum est emptoris*' does at any rate not apply to generic goods, not yet specified. This was to be the limit, according to the will of the parties, of the effects of '*force majeure*'. Nothing in the text of the agreement can lead one to suppose that in addition to its liberation, Alsing had to obtain as 'compensation' the right to effect after the event the deliveries made impossible by the events of the war and its aftermath.

" Lastly, it is necessary to consider that the supply contract was a contract of successive or continuous execution, but subject to an extinctive term. It should be noted that the obligations which establish between the parties a lasting relationship cease on expiry of the agreed period without account having to be taken of the fact that during certain periods performance was impossible for either of the parties. In other words, the duration of the contract should be thought of as a '*tempus continuum*' and not as a '*tempus utile*', in which the contract would be extended for the whole of the periods during which execution encounters obstacles. The '*tempus utile*' clause is exceptional and should follow clearly from the contract; it is inconceivable in a contract of long duration.

" These principles are those of common law springing from Roman law (*cf.* Regelsberger, *op. cit.*, Section 125, III, p. 459–460; Section 126, II, p. 462–463; Windscheid/Kipp, *Pandekten*, II, Section 361 and Section 264, 2). They are recognized by modern legislation (*cf.* Enneccerus-Lehmann, *Obligationenrecht*, Section 24, I, 3; von Tuhr-Siegwart, Section 63, II, 3, p. 493; Planiol-Ripert-Esmein, *op. cit.*, VI, no. 45, p. 47).

" ' In contracts of successive execution (Esmein, *loc. cit.*) the suspension of the performance of the contract for a certain period involves the definite suppression of the effects of the contract related to this period, even if it does not justify its complete dissolution. An extension of the effects of the agreement beyond its normal term, and for a period equal to that of the suspension, can only result from an agreement of the parties or from a legal provision.' Greek jurisprudence is based on these grounds (Decrees of the Supreme Court of Appeal No. 134/1940, 178/1948, 366/1949, 263/1951).

" One of the plaintiffs' consultants, Prof. Triantaphyllopoulos, invokes Article 279 of the Greek Civil Code of 1940. This Article provides, according to the translation by Gogos:

> ' When the law or the parties fix a period within which a right is to be exercised (exclusive or peremptory period), the provisions for the prescription are applicable by analogy.'

" These provisions are in particular those for the suspension of prescription (Articles 255–257). According to Article 255, prescription is suspended when the rightful claimant is prevented because of '*force majeure*' to put forward his claim during the last six months of the period.

" The latter specification is enough to exclude the application of Article 279: the impediment which the plaintiffs exploit is indeed prior to the last six months before expiry of the contract. However, Article 279 manifestly does not concern the extinctive or resolutory prescription to which the duration of the engagements is subject, but the expiration periods which the claimants should respect in order to safeguard their right (*inter alia*, periods within which they can bring their action). This being the case, it is superfluous to decide whether Article 279 would have been applicable in the case in question with regard to the provisions of transitory law (Articles 18 and 25 of the Law of Introduction). If it was true that the principle enunciated in Article 279 was already known from previous law, this would not have any consequences, for it manifestly did not apply to the extinctive prescription for which a well-established jurisprudence exists.

" Alsing also note in Chapter 85 of their memorandum of 30th August, 1954, the various decree-laws which extended contracts or concessions to take account of the fact that '*force majeure*' circumstances had prevented their execution for a certain number of years. But the fact that laws had been passed in this respect confirms that the impediment due to '*force majeure*' does not in itself have a suspensive effect on the course of the contract.

" 4. Consequently, the suspension of deliveries during the years 1940–1946 does not justify the plaintiffs' claims to the effect that the State is still under the obligation, after expiry of the contract, to take delivery of all the matches which it will require for its monopoly for six years." (At pp. 55–61.)

(VI) *Unforseen circumstances and the* clausula rebus sic stantibus.—

" 1. Alsing, through their consultants, also put forward the so-called theory of unforeseeable circumstances in support of their argument. Although the plaintiffs' representative declared in his oral pleadings before the umpire that he did not intend to take into account the '*clausula rebus sic stantibus*', there is, however, reason to examine the claim from this point of view, as the judge had to apply the law *ex officio*. Furthermore, from various points of view, the plaintiffs' arguments on their first two pleas invoke the radical change in expectations.

" The defendant begins by objecting that the theory of unforeseeable circumstances was not admitted in Greece in Roman-Byzantine law applied until 1946. It is true that it was established by Article 388 of the Greek Civil Code of 1940. But precisely Article 24 of the 'Introduction Law' provides that the obligations of which the generative fact arose before the Civil Code came into force, remain subject to previous law as [far as] concerns the results of an unforeseeable change in the basis of the contract. It was alleged that before the Code came into force, the theory was the subject of discussions in doctrine and some of the authors declared themselves in its favour, but jurisprudence still opposed it. On the contrary, the authors of the legal opinions produced by Alsing claim that the law did no more than codify principles already accepted by a number of authors and applied in particular by the legal precedents relating to the devaluation of currency.

" It is not necessary to decide whether the rules of good faith valid in previous Roman law could already form the basis of the application of the '*clausula rebus sic stantibus*'. If such were the case, the theory of unforeseeable circumstances should certainly not be admitted to a greater degree than that fixed by Article 388 of the Greek Civil Code. In comparison with this text, Alsing's request was groundless.

"2. Article 388 provides (according to the German translation by Gogos):

> 'If the circumstances in view of which the parties, having regard to the rules of good faith and to business practice, mainly decided to conclude a synallagmatic contract, subsequently alter, for extraordinary reasons which it was impossible to foresee, and if, as a result of this change, the performance, also taking into account the consideration therefor, became inordinately burdensome for the debtor, the latter may request the judge to reduce what is to be performed at his discretion to a suitable extent, or to rescind the whole of the contract or the part not performed.'

"This provision, which is based on Windscheid's theory of presupposition (*Die Lehre des Römischen Rechts von der Voraussetzung*, 1850, *The Doctrine of Presupposition in Roman Law*), corresponds to the statement of Swiss doctrine and jurisprudence on the conditions and effects of the '*clausula rebus sic stantibus*'. According to von Tuhr-Siegwart (*op. cit.*, pp. 612–613), the remedy should be retained in bilateral contracts when, as a result of a radical and unforeseeable change in circumstances, the relationship between the two performances is altered to such an extent that the performance of one of the parties can no longer be reasonably considered as the equivalent of the performance due by the other; the principle of contractual fidelity is limited by [the] principle of good faith, which is of a higher order. Inspired by these ideas, the Federal Court allows a bilateral contract to be terminated when, as a result of unforeseeable circumstances, the relationship between the performance and the consideration therefor has altered so radically that the performance of the contract could not be imposed on one of the parties (A.F.C., 60, II, 213; 61, II, 261). Jurisprudence has even permitted the contract, according to the circumstances, to be modified by reducing or increasing what is to be performed in order to re-establish an equitable relationship, when the value of the consideration therefor has diminished or increased to an extraordinary degree (A.F.C., 59, II, 374; 47, II, 318). German doctrine and jurisprudence broadly applied the same criteria (*cf.* Enneccerus-Lehmann, *Das Recht der Schuldverhältnisse—Law of Contract*, 1954, Section 41). Defining the conditions of application of the theory of unforeseeable circumstances, should it be admitted in French civil law, Esmein declares that 'the change in the value of the services rendered should far exceed the provisions which could reasonably be made at the time of the agreement' and adds: 'The contract should be observed as long as the injustice of it does not become intolerable (Planiol-Ripert-Esmein, *op. cit.*, No. 397, page 537).

" Finally, the conditions of application of the '*clausula*' are reduced to the following:

" (1) An unforeseeable event, independent of the will of the aggrieved party;

" (2) upsetting of the original balance between performance and consideration therefor;

" (3) the excessive nature of this lack of balance, going beyond the risk of the contract.

" The plaintiffs base their plea of unforeseeable circumstances on two facts: failure to repay the loans on 31st July, 1954; [and] suspension of performance of the contract during the period 1940–1946.

" 3. According to the professors consulted by the plaintiffs, the obligation of STAB, then that of Kreuger and Toll, to pay the amount of the loans, and the State's obligation to draw its supplies of matches from Alsing, bear the relationship of performance and consideration therefor. The suspension of the administration of the loan from 1932 upset the economy of the contract (Triantaphyllopoulos, page 8 *et seq.*). The clause according to which the loan was to be repaid ' at the latest ' by 31st July, 1954, served as counterbalance to the clause subordinating the validity of the supply contract to the payment of the amounts lent. The balance existing between the rights and the obligations of the parties was upset owing to the fact that repayment was not effected on the promised date (Maridakis, pp. 6–7). The Treasury was to have at its disposal sums lent for a period of time equal to the duration of Alsing's licence to supply matches (Sakketas, page 13). The balance can only be restored by virtue of the '*clausula rebus sic stantibus*', by extending the State's obligation to be supplied by Alsing.

" (a) As was noted above, the supply contract and the loan contract (both loans) were concluded in consideration of each other and during the period of the contract their interdependence was no doubt maintained in various respects (V above[1]). As regards combined contracts, it is worth comparing, in order to apply the theory of unforeseeable circumstances, the performances due by each party by virtue of both contracts. The fact that in the present case the Greek State had dealings with three different companies does not straightaway prevent one of them—the plaintiffs—from invoking the '*clausula*', in so far as the ties between Alsing, STAB and A/B Kreuger & Toll themselves did not change (below, letter d).

" By virtue of the agreements of 1926 and 1930, the Kreuger group on the one hand promised to deliver for 28 years the matches required by the Greek monopoly, on the other hand made a loan of two million pounds sterling to the State. For its part, the State undertook on the one hand to take delivery of the matches and to pay for them during the same period, and on the other hand to repay the amount of the loan and to administer the interest until 31st July, 1954. As a result of the moratorium decreed by the Greek State in 1932, the annuities ceased to be paid and only a percentage of the interest was paid until 1941; since then, as a result of the war and the post-war situation, the administration of the loans was entirely suspended.

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[1] See *supra*, pp. 642–647.]

" These facts certainly altered the economy of the deal concluded with the Greek State for the Alsing-STAB-Kreuger & Toll group. The group expected to receive every year both the price of the matches supplied and the annuities (repayment of principal and interest) of the loans allowed. Instead, if it collected the value of the supplies (except during the six years of interruption), it was only repaid (itself or its trustees) a minor part of the sums lent, as the loans were practically extended for an indeterminate period.

" (b) However, in the first place, it is hardly possible to admit that the circumstances involving the moratorium and the complete suspension of the administration of the loans were quite unforeseeable by the Alsing-STAB-Kreuger & Toll group. Greece is not a country which enjoys great natural resources. It had already experienced serious financial crises. At the time of the contracts the administration of its public debt was run by an international financial Committee (*cf.* Article 4 of the loan agreement of 1926). To this add that in the long-term contracts, the parties should reckon with rather considerable fluctuations due to troubles of which the origin cannot be foreseen (ATF, 47, II, 453; 50, II, 256). If the lender and supplier could not foresee the events of the 1939–1945 war, he should, however, expect that in the course of the 28 years of the contract, more or less serious difficulties would arise as a result of internal or external events.

" (c) In the second place, it is not possible to consider that the disturbance caused to the performance of the combined contracts is so enormous as to call for intervention by the judge.

" In this respect the fact not need be taken into account that following Kreuger and Toll's bankruptcy, the Greek State redeemed bonds Nos. 9–28 of the 1926 loan. If the group sustained as a result the considerable loss since the bonds were redeemed by payment of 21% of the capital, this is the result of a freely accepted agreement.

" It therefore only remains that the ex-Kreuger group or its trustees do not secure repayment of the loans subscribed by the Greek State within the periods stipulated in the contract. It is not known for the time being when the administration of these loans will be resumed and what sacrifices will be required of the bearers of bonds. But whatever be the outcome, the debts derived from the loan agreements still exist (the three bonds of the 1926 loan and the 23 bonds of the 1930 loan) and the lenders continue to have a title, in the form of interest, as consideration for their loan. In the course of the term of the contract, Alsing realized their profit on the supply contract (except for six years, see 4 below). Under these circumstances, and even if the bearers of bonds were finally to sustain a loss in the liquidation of the loans, the loss of balance resulting from it, if the performances of both parties are considered altogether, would not be disproportionate to the risk which the Kreuger group was to run in a long-term business offering a sure speculative element. If it is not necessary, in order to justify the judge's intervention, for the preservation of the contract to involve the debtor's ruin (*cf.* ATF, 59, II, 377 to 378), or that it results in the debtor's correlative enrichment (*cf.* ATF, 48, II, 365), it is, however, necessary for the latter, by exacting that the obligations undertaken be fulfilled, be guilty of a misuse of law akin to usury (ATF, 59, II, 377–378). But it would be impossible to reproach the Greek State in this way for refusing to extend this contract, notwithstanding the non-repayment of part of the loans bound by a supply contract.

" (d) Even if the conditions of intervention by the judge were realized, the latter could not conceivably restore the equilibrium of the contracts by deciding that Alsing would be entitled to continue to supply matches to the Greek monopoly. Recent doctrine and jurisprudence, particularly in Switzerland (*cf.* Deschenaux, ' La revision des contrats par le juge ', [in] *Actes de la Société suisse des juristes*, 1942, p. 511 *sv.*; Merz, ' Die Revision der Verträge durch den Richter ', *loc. cit.*, p. 394 *sv.*), allow the judge to ' revise ' the contract. But a court has never been known to extend the duration of the validity of a contract in order to restore the balance of reciprocal performances. In France, where in practice the theory of unforeseeable circumstances is applied in administrative contracts, particularly in supply contracts, it is commonly admitted that this theory ' may be invoked in order to claim a readjustment of the prices, of the financial conditions of the contract, but not to justify a change in the periods of performance ' (Jèze, *Contrats Administratifs—Administrative Contracts*, II, p. 302).

" But, whatever be the position as regards re-establishing the economy of a contract by extending its duration, the step of having recourse to this means is at any rate precluded in the present case. The Kreuger group, which included among other companies those which had dealings with the Greek State, no longer exists. A/B Kreuger and Toll have been dissolved. The loan bonds are held neither by Alsing nor by STAB; they are in the hands of third parties: Torsten Kreuger, the bankrupt Kreuger & Toll and the L. M. Ericson telephone company. Alsing did not even allege that they had taken upon themselves any guarantee towards the persons and companies holding the bonds. . . . The plaintiffs cannot sustain any loss owing to the fact that the loans were not yet repaid. If the judge were to concede to Alsing the right to continue to supply the Greek monopoly with matches and therefore to realize a profit, it would secure for it enrichment which could at most only be warranted if it continued to form a part of the same group as the creditors of the bonds.

"From then on, the plea of unforeseeable circumstances is in every respect unfounded in so far as it is related to the failure to repay the loans as at 31st July, 1954.

"4. It is equally unfounded inasmuch as the plaintiffs invoke cessation of the deliveries in the period between 1940 and 1946.

"Indeed, this suspension of deliveries deprived Alsing of a part of the profits which they hoped to realize over the 28 years which the contract was to cover and to this extent it modified the economy of the agreements concluded with the Greek State.

"But, in the first place, in a contract of such long duration, the plaintiff was to expect certain disturbances to the normal course of the contract, whether they be occasioned by an economic crisis, internal strife or the events of warfare (*cf.* above, 3, b). It is even true to say that extraordinary events had been foreseen by the parties: in fact, Article 13 of the supply contract provides for cases of '*force majeure*' the effect of which is to release the company from all responsibility; this clause seems to be in direct conflict with the plaintiffs' ability, in case of impossibility of performance, to claim anything else.

"In the second place, if the supply contract is taken by itself, it is not possible to talk of a lack of balance between performance and consideration therefor, since they were not exchanged; Alsing only lost profits corresponding to six years during and after the war. Now the theory of unforeseeable circumstances could not be invoked in order to secure for one party compensation for a profit which it did not make as a result of unforeseeable events. But, even if a different opinion were formed, it is clear that the loss of the profit expected for six years out of 28 would not be disproportionate to the risk which the contract held for Alsing.

"The same applies if one considers the loss of profit for six years in the general economy of the inter-party relations. It is not true that, as is maintained by the plaintiffs in their memorandum of 30th August, 1954, (page 53), the State's consideration for the 1926 loan was not only the interest stipulated but also the advantage resulting from the supply of matches during the whole term of the contract in the sense that STAB was to receive interest increased by 3–4 per cent. for the profit made on the sale of the matches. This results in rates at which the loans subscribed by Greece were negotiated at the time (*Faits*, Facts No. 3) that the nominal interest of 8½ per cent. (corresponding to a real rate of 9, 10 per cent.) stipulated in the 1926 loan agreement was in no way less than the usual rates for outside loans. Thus the fact that Alsing did not realize their profit in the years 1940–1946 does not amount to the partial suspension of the additional interest service.

" 5. In conclusion, considered from the angle '*clausula rebus sic stantibus*', Alsing's request should also be dismissed." (At pp. 62–69.)

[Report: Unpublished. The original text of the Award is deposited with the Record Office of the Cantonal Court of Vaux at Lausanne, and duplicated copies (in an English translation) are deposited in the Library of the Peace Palace at the Hague and in the Squire Law Library of the University of Cambridge.]

Note.—The Award, as digested and partly reproduced above, does not raise issues of international law in the accepted sense. It has been included in the present volume mainly for two reasons: In the first instance, it is concerned with a subject of growing importance in international relations, namely, the interpretation of agreements concluded between Governments and foreign nationals and companies. This applies, in particular, to the question of the nature and interpretation of so-called administrative contracts concluded by a Government. Secondly, the above Award seems to be of importance in connection with the formulation of general principles of law, on a comparative basis, by reference to various systems of municipal law and jurisprudence. Although in the present case the Umpire formulated what are in effect general principles of law for the purposes of the interpretation not of a treaty but of a contract concluded between a Government and a foreign company, the method applied is instructive in connection with " general principles of law " in their wider sense.

See, for a Note on this Award, Schwebel in *International and Comparative Law Quarterly*, 8 (1959), pp. 320–345.

Arbitration—Law Applied by Arbitral Tribunals—Previous Decisions of Permanent Court of International Justice Regarded as *Res judicata*—Article 59 of Statute of the Court—Article 84 of Hague Convention for the Pacific Settlement of International Disputes, 1907—Relevance of Distinct Nature of *Lis*—Relevance of Differing Basis of Previous Judgment—Relevance of Terms of *Compromis* Leading to Previous Judgment.

See p. 81 (*Lighthouses Arbitration between France and Greece—Claims No.* 11 *and* 4).

iii.—The Arbitration Treaty. Appointment and Withdrawal of Arbitrators

Arbitration — In General—The *Compromis* — Procedure — Regrouping and Analysis of Claims in Historical Order and According to Points of International Law Raised—Reference to Earlier Arbitration on Related Matter—State Succession—Succession to Rights and Obligations—Two Successive Succession States—Effective Date of Subrogation—Relevance of Dates of Coming into Force of Peace Treaties—International Nature of Arbitration Where One Party is a Government Acting on Behalf of a Commercial Firm—Plea of Prescription—Rejection of—Implied Exclusion by Terms of *Compromis*—Exclusion Implied by History of Relations between the Parties—The Award—Competence to Give Lump Sum Judgment *ex aequo et bono*—Necessity for Request from Parties—Execution of Award—Time Ordered—Appointment of Experts—Currency and Mode of Payment—Changes in Currency After Signing of Award—Interest on Sums Awarded to Parties—Whether Payable—Relevance of Intention of Parties—Refusal to Award Interest for Period Down to Date Fixed for Execution—Award of Interest from Date Fixed for Execution.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—On July 15, 1931, France and Greece concluded a Special Agreement (*Compromis*) to arbitrate, in the following terms:

> " Chapter I
>
> " Article 1.—The Permanent Court of International Justice shall be requested to give its decision upon the question whether the contract concluded on April 1st/14th, 1913, between the French firm Collas & Michel, known as the ' Administration générale des Phares de l'Empire ottoman ', and the Ottoman Government, extending from September 4th, 1924, to September 4th, 1949, concession contracts granted to the said firm, was regularly concluded and is accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently.
>
> . . . .
>
> " Chapter II
>
> " Article 7.—As soon as the judgment of the Permanent Court of International Justice on the question referred to in Article I has been delivered, all pecuniary claims of the firm Collas & Michel against the Greek Government and of the Greek Government against the firm, shall form the subject of a settlement between the Greek Government

> and the firm Collas & Michel. The same shall apply as regards the fixing of the sum payable for the redemption of the concession, should the judgment above mentioned declare the contract of April 1st/14th, 1913, to have been regularly concluded.
>
> " Failing an agreement within one year, these questions shall be submitted to an arbitral tribunal, consisting of three members appointed as follows: one by the French Government, one by the Greek Government, the third member, who shall act as president, being appointed by mutual agreement between the two Governments or, failing such agreement, by the President of the Permanent Court of International Justice.
>
> . . . .
>
> " For the rest, the tribunal shall conform to the rules for proceedings by arbitration in Chapter III of Part IV of the Convention for the Pacific Settlement of International Disputes, signed at The Hague on October 18th, 1907."

In accordance with Chapter I of this Agreement, the Permanent Court of International Justice, by its Judgment of March 17, 1934,[1] decided that the contract above mentioned " was duly entered into and is accordingly operative as regards the Greek Government and so far as it concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently ". This Judgment was later complemented, in pursuance of a new *Compromis* dated August 28, 1936, by a second Judgment, of October 8, 1937,[2] which decided that " the contract entered into on April 1st/14th, 1913 . . . extending from September 4, 1924, to September 4, 1949, the contracts concluded by the said Company, was duly entered into and accordingly is operative as regards the Greek Government so far as it concerns lighthouses situate in the territories of Crete, including the adjacent islands, and of Samos, which were assigned to it after the Balkan wars."

After the latter Judgment had been pronounced, the French firm of Collas & Michel, known as the " Administration générale des Phares de l'Empire Ottoman ", and the Greek Government entered into the negotiations provided for in Article 7 (1) of the *Compromis* of 1931 and by 1938 they were on the point of reaching agreement on the liquidation of their mutual claims. There was, however, a check in the negotiations, and the two parties to the *Compromis*, that is, the French Government and the Greek Government, commenced the arbitration provided for in Article 7 (2) of the *Compromis*. The Second World War prevented the arbitration from going forward, and it was not recommenced until several years after the war.

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[1] *Lighthouses Case* (*France* v. *Greece*): *P.C.I.J.*, Series A/B, No. 62; *Annual Digest*, 1933–1934, Case No. 36.]

[2] *Lighthouses in Crete and Samos*: *P.C.I.J.*, Series A/B, No. 71; *Annual Digest*, 1935–1937, Case No. 49.]

The two questions now submitted to the Tribunal were:

(a) The pecuniary claims of Collas & Michel against the Greek Government and those of the latter against the former; and

(b) The assessment of the redemption value of the lighthouses concession.

[I. *Re-grouping of the claims*]—In order to deal most conveniently with the various claims, the Tribunal re-grouped the heads of claim "according to the questions of public international law which they raised", and said: "Thus, the question of the responsibility of Greece arises, according to the allegations of Collas & Michel, under the following four groups:

A. Facts alleged to be attributable to Turkey and dating back before 1924;

B. Acts imputed to Crete and dating back before 1913;

C. Acts or omissions imputable to Greece as occupying Power or belligerent between 1912 and 1913 and between 1919 and 1924;[1]

D. Acts or omissions imputed to Greece as successor State and as grantor by subrogation, during the period 1913 to 1949.[2]

The counterclaims raised by Greece are dealt with according to their place in this framework or, ultimately, according to their nature."

[1] Of this group the Tribunal later said (at p. 85): "The third group of claims by Collas & Michel is composed of those which arise out of acts committed by the civil or military authorities of Greece in her capacity of occupying belligerent Power. This group is subdivided into two, according as the facts giving rise to the claims occurred [1] during the Balkan Wars of 1912 and 1913, or [2] during the First World War [and] notably during the period of settlement with Turkey between 1919 and 1924." These claims are as follows:

Claims No. 8, 7, 1 and 10—during the Balkan Wars.

Claims No. 3, 13 and 14—during the last part of the First World War.

But: "Claims No. 8 and 1, which arose during the Greek military occupation, continued to be a subject of dispute after Greece had definitively acquired territorial sovereignty."]

[2] Of this group the Tribunal later said (at p. 95): "The fourth group of claims by Collas & Michel has its origin in acts committed by Greece as grantor State by subrogation. This group forms the largest series of all the claims by that firm. It is divided into two, according as the acts were committed during the term of the third concessionary contract (1899–1924), the original validity of which has never been contested by Greece, or during that of the last contract (1924–1949), the nature of which as it operated in regard to her was finally determined only by the Judgments of the Permanent Court of International Justice of 1934 [*Lighthouses Case* (*France* v. *Greece*): *P.C.I.J.*, Series A/B, No. 62; *Annual Digest*, 1933–1934, Case No. 36] and 1937 [*Lighthouses in Crete and Samos*: *P.C.I.J.*, Series A/B, No. 71; *Annual Digest*, 1935–1937, Case No. 49] respectively. But . . . the division has hardly any juridical or practical consequences, so that [the Tribunal] has seen no value in applying it in its classification of the claims." These claims were as follows: Claims No. 1, 1b, 5, 6, 8 (second part), 15, 19, and part of 21, and 26—between 1899 and 1924; Claims No. 10a, 18, 24 and 25—between 1924 and 1949.]

The Tribunal compiled a Table (I) showing in chronological order, within the above four groups, the various claims made by Collas & Michel against Greece, with the amount of each item as claimed and the amount (if any) admitted by Greece. The Table is too long for reproduction here, but it includes such items as the exemption since 1908 from tolls of a Greek ship; non-payment at various times of light dues for requisitioned ships, mail boats, etc.; customs dues levied illegally; seizure of and damage to buoys, and so on; and the redemption of the concession. The Greek counterclaims were similarly tabulated; they consisted of such items as illegal collection of light dues; the cost of constructing new lighthouses; the maintenance and provisioning of lighthouses at various times; and so on.[1]

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[1] Omitting decisions which are not of sufficient importance, the claims and counterclaims examined by the Tribunal are reported elsewhere in this volume as follows:

I. The French claims (here grouped under the four headings mentioned on p. 661 *supra*):

A. *Claim No.* 12*a* (removal of a buoy at Vardar)—see *supra*, p. 106.

B. *Claim No.* 4 (exemption of the *Aghios Nicolaos* from payment of lighthouse dues)—see *supra*, p. 81.

Claim No. 11 (order to prepare the construction of new lights at Sparda and Elaphonessi, followed by refusal to authorize)—see *supra*, p. 81.

C. *Claim No.* 1 (failure by Greece to pay lighthouse dues in respect of requisitioned ships)—see *infra*, p. 801.

Claim No. 3 (non-payment of increased lighthouse dues for ships requisitioned at Constantinople)—see *supra*, p. 304.

Claim No. 8 (seizure of receipts at Salonika before the transfer of territorial sovereignty to Greece)—see *infra*, p. 806.

Claim No. 13 (deterioration of the light at Dedeagatch)—see *infra*, p. 780.

Claim No. 14 (deterioration of the buoy at Yeni Kalé)—see *infra*, p. 679.

D. *Claim No.* 1 (as Claim No. 1 above)—see *supra*, p. 341.

Claim No. 5 (neglect or refusal by Greece to " lend her authority " to the collection of lighthouse dues)—see *supra*, p. 296.

Claim No. 6 (collection by Greece for her own account of lighthouse dues in certain island agencies)—see *infra*, p. 677.

Claim No. 8 (seizure of receipts at Salonika after the transfer of territorial sovereignty to Greece)—see *infra*, p. 709.

Claim No. 10 (*a*) (cost of repair, etc., of certain lights—procedural point)—see *infra*, p. 678.

Claim No. 15 (deterioration of the lighthouses on the Isle of Paspargos)—see *supra*, p. 354.

Claim No. 18 (cost of retirement pensions to certain members of the staff of Collas & Michel)—see *supra*, p. 298.

Claims No. 19 *and* 21 (forced evacuation of the Salonika office of Collas & Michel)—see *supra*, p. 352.

Claim No. 24 (costs of legal proceedings)—see *infra*, p. 680.

Claim No. 25 (eviction of Collas & Michel from its agency building at Mytilene)—see *supra*, p. 349.

Claim No. 26 (gold equalization of receipts)—see *supra*, p. 342.

II. Such Greek counterclaims as were " independent in their nature ":

Counterclaim No. 1 (non-reimbursement of share of receipts from 1913 to 1928)—see *supra*, p. 94.

Counterclaims No. 3–6 (cost of operating lighthouses after possession taken)—see *supra*, p. 99.

Counterclaim No. 9 (cost of installing a new light at Tenedos)—see *infra*, p. 782.

III. The fixing of the sum payable for the redemption of the Concession: *Claim No.* 27—see *supra*, p. 299.

The Tribunal also compiled a second Table (II) of " Territorial Adjustments affecting Greece ", starting with the rectification (by Treaty dated May 24, 1881, between the Great Powers and Turkey) of the Greco-Turkish frontier under Article 24 of the Treaty of Berlin of 1878, and ending with the cession by Italy to Greece of the Dodecanese Archipelago and Castellorizo under Article 14 of the Treaty of Peace of Paris of February 10, 1947, between the Allied and Associated Powers and Italy.

The complexity of the matters to be decided was indicated by the fact that, in the words of the Tribunal: " From Table II, it appears first that the question of the exact date at which the territorial sovereignty of a given region was acquired, or other territorial changes produced, is different for different parts of New Greece, according as whether they were acquisitions or other territorial changes (1) consequent upon the Balkan Wars or (2) consequent upon the First World War. And as regards the acquisitions under (1), according as they were connected with the acquisition of territory situated in the Balkan Peninsula to the west of Mesta, of the islands of the Aegean Sea, or of Crete. As regards those under (2), according as they were connected with Western Thrace (in particular Dedeagatch, the only region presently of importance, because there are, or were, no lights or agencies of Collas & Michel in Western Thrace other than Dedeagatch) or certain of the islands of the Aegean Sea (in particular Tenedos and Pasparagos). It thus follows that the territorial changes in Greece, those consequent upon the Balkan Wars and those consequent upon the First World War alike, are difficult to date exactly in international law. [In view of the paucity of the evidence adduced before it on these matters] the Tribunal found itself under the necessity of attempting itself to reconstruct the history of these changes.

[II. *Historical Survey*]—

" 1. *Territorial changes consequent upon the Balkan Wars.*—The Treaty upon which are based all the consecutive territorial changes is the Treaty of Peace concluded at London on May 30, 1913, under the mediation of the Great Powers, between Turkey of the one part and the four allied Balkan States, Bulgaria, Greece, Montenegro and Serbia, of the other. This Treaty provided for true territorial concessions, in favour of the four Balkan Allied Powers, only as regards: (a) the Ottoman territories on the European continent to the west of a line drawn from Enos, on the Aegean Sea, to Midia, on the Black Sea (this line was adjusted a few months later to the Enos-Adrianople line, following the course of the Maritza—Article 1 of the Treaty of Peace between Bulgaria and Greece of September 29, 1913) except Albania (Article 2); and (b) the Island of Crete (until then an autonomous State under Ottoman suzerainty) (Article 4).

" As regards (c) Albania (Article 3), and (d) all the Ottoman

Islands of the Aegean Sea (except Crete) (Article 5), the Treaty of London did not provide for any territorial cession, properly so-called, either to the Balkan Allied States or to the Great Powers (who, in any event, were not themselves parties to the Treaty); but it merely referred to the latter the task (as to (c)) of delimiting the frontiers of the new State and (as to (d)) of deciding the fate of the islands of the Aegean Sea. Those islands had not, in May 1913, been definitively detached from Turkey by a formal cession. Their fate was left in suspense until the final decision to be taken concerning them by the Great Powers in pursuance of a collective authoritative and unilateral resolution, which alone would put an end to the sovereign rights of Turkey over those islands. There is nothing in the text of the Treaty of London which suggests that the islands were ever placed under a temporary co-imperium of the Great Powers as has often been the case with other similar international régimes.

" Finally, as regards (e), Mount Athos, there was certainly a territorial cession by Turkey to the Allied States (Article 2), but in this instance it was subject to a mandate given to the Great Powers, to decide on its fate.

"In view of the foregoing, the exact date on which a given territory of new Greece passed juridically under the sovereignty of Greece after the Balkan Wars, is determined by the series of events, according as it concerned its new continental provinces (or the Island of Crete), on the one hand, or the islands of the Aegean, on the other.

" [The Tribunal set out in parallel columns headed respectively ' A. The Mainland of New Greece (west of Mesta) ' and ' B. Islands of the Aegean Sea ', the various events in question, commencing with the (unratified) Treaty of London of May 10, 1913, and the Treaty of Peace of Bucharest between Bulgaria of the one part and Greece, Montenegro, Roumania and Serbia of the other part, of August 10, 1913, and ending with the definitive allocation of the islands to Greece on April 24, 1914, and continued:] This table shows clearly that the arguments put forward on behalf of Greece that the territories in question had passed to Greece by May 30, 1913, at the latest, cannot be correct; on the contrary, the territories cannot have become Greek until May 30, 1913, at the earliest, since the selection of the exact date can depend only on that of the Treaty of London or on certain subsequent dates.

" A. For the *Mainland of New Greece*, there are two distinct decisive factors. The territorial acquisition of that region by Greece was, indeed, effected as a result of two distinct, but equally indispensable, operations: on the one hand, its detachment from the Ottoman Empire, and on the other, its being assigned to Greece. The first juridical fact can be regarded as having been produced either by the conclusion of the Treaty of London in May 1913, or by the signature, or the exchange of ratifications, of the Treaty of Athens in November 1913. The second can have had effect only from the Inter-Allied settlement of Bucharest in August 1913. In any event, the latter cannot have produced any definitive effects before the first juridical fact above-mentioned had been completed. Everything depends, therefore, on the question whether the settlement of Athens should be deemed to have had an effect which related back to the settlement of London. If so, that is, if the detaching of the territory in question from Turkey operated juridically in May 1913, that territory ought to be regarded as having been definitively assigned to Greece in August 1903, and that assigning to have been confirmed *a posteriori* by the Treaty of Athens. If, on the contrary [the settlement did not relate back to the Treaty of London], that is to say, if the detaching of the territory from Turkey did not become definitive in law until November 1913, its assignment to Greece by the Treaty of Bucharest cannot be regarded as definitive until November. The further question, which of the two dates in August 1913—the 10th [signature of the Treaty of Bucharest] or the 25th [exchange of ratifications]—and in November 1913—the 14th [signature of the Treaty of Athens] or the 29th [exchange of ratifications]—ought to be adopted is simple of solution. It is clearly the latter of the two possible dates in August but the former of those in November, seeing that the Treaty of Bucharest did not come into force until the exchange of ratifications on August 25, 1913, while the Treaty of Athens came into force on the date of its signature, November 14, 1913. Even if it was thought that an article in a treaty subject to ratification, which provided for its immediate provisional coming into force, could not be regarded as in itself definitively operative, the subsequent exchange of ratifications would in any event clothe it with definitive binding force, and that, by way of a *ratihabitio*, with retroactive effect. There are, in consequence, only two dates from which to choose—August 25 or November 14, 1913—according as the Treaty of Athens is or is not to be regarded as having, in conformity with the common intention of the two contracting parties, taken effect retroactively to the date of the signature of the Treaty of London in May 1913. Even though the Treaty of Athens does not deal with the point in express terms, the Tribunal is inclined to admit that retroactive effect, for the reason that the bilateral Greco-Turkish Treaty of Athens was in reality the final and formal liquidation of irrevocable events, the liberation of the non-Turkish part of the Balkan peninsula by the combined forces of the Balkan Allies, on the one hand, and the partition between them of the territory thus liberated, on the other.

" From the point of view of international law, the territory of continental New Greece to the west of La Mesta ought to be regarded as having been detached from the Ottoman Empire on May 30, 1913, and as having been assigned to Greece on August 25, 1913, after an inter-Balkan *co-imperium* of about three months.

"B. As regards the *Islands of the Aegean Sea* (including the autonomous State of Samos), the problem presents itself differently because in that case there was no interim territorial cession to a group of States forming a *co-imperium*. The passing of the Ottoman territories to Greece operated, in this case, not by means of such a provisional *co-imperium* (in this instance, of the Great Powers) but in the form of a direct assignment of sovereignty to Greece by an authoritative decision taken by the Great Powers under a mandate which had been conferred on them by the Treaty of London.

"In this case also, retroactive effects can be seen, commencing with the confirmation by the Great Powers, on April 24, 1914, of the acceptance on February 21, 1914, to which they had made subject the final adjudication of the islands to Greece by their decision of February 13, 1914. That decision being in any event subsequent to the coming into force of the territorial clauses contained in the basic Treaty of London, the Great Powers executed thereby a mandate which had already become definitive and which no longer needed to be validated retroactively by some new international instrument.

"As regards sovereignty over the islands of the Aegean Sea, there took place, then, simultaneously detachment from Turkey and assignment to Greece, on February 13, 1914."

[Before dealing with events which took place during the First World War, the Tribunal gave a brief account of certain of the islands—Crete, Imbros and Tenedos, islands (especially Paspargos) situated less than three miles from the coast of Turkey-in-Asia, the Dodecanese, and Castellorizo—the juridical disposition of which was different from that of the other islands. These events are not presently of importance.]

"(2) *Territorial changes after the First World War.*—Under this head has to be ascertained the exact date on which Western Thrace passed under the territorial sovereignty of Greece after the war of 1914–18. In this case also a short table of dates is necessary.

> "November 27, 1919—conclusion of Treaty of Peace of Neuilly: Article 27 (2) maintains the sovereignty of Greece over Macedonia as far as La Mesta; Article 48 reserves the destiny of Western Thrace (previously assigned to Bulgaria after the Balkan Wars) to a decision of the Great Powers, in favour of whom Bulgaria renounces all her rights and title over this territory.
>
> "May 27, 1920—handing over of territory by French occupying forces to Greek forces.
>
> "August 9, 1920—coming into force of Treaty of Neuilly on deposit of ratifications.

"August 10, 1920—conclusion of Treaty of Sèvres (never ratified).

"August 10, 1920—conclusion of separate Treaty of Sèvres by which the Great Powers assigned Western Thrace to Greece (unratified for about four years).

"July 24, 1923—conclusion of Treaty of Peace of Lausanne (see Article 2 (2)).

"July 24, 1923—Protocol XVI annexed to above Treaty of Peace deciding the definitive transfer of Western Thrace to Greece (see also Protocol XV).

"August 6, 1924—coming into force of Protocol XVI on deposit of ratifications of Treaty of Peace of Lausanne.

From this series of historical facts, it appears that Article 9 of Protocol XII of the Treaty of Peace of Lausanne[1] does not *directly* concern Western Thrace. The latter is not actually a 'territory detached from Greece under the Treaty of Peace (of Lausanne)' in the sense of the first part of the said Article 9. Even though its definitive assignment to Greece by Protocol XVI [2] of the said Treaty of Peace (which was intended to bring definitively into force the separate Treaty of Sèvres of August 10, 1920) coincided with the coming into force of the Treaty of Peace on August 6, 1924, Western Thrace was not on that date detached from Turkey; on the contrary, it was detached from Bulgaria, to which it had passed after the Balkan Wars. And if it does come within the category of 'territories detached from Turkey after the Balkan Wars' mentioned in the second part of Article 9 of Protocol XII, it was in the first instance a detachment from Turkey followed by a transfer to Bulgaria and not to Greece. It was only in the second instance that Western Thrace was 'detached' anew—this time from Bulgaria—to be transferred to Greece.

"M. Borel, the Arbitrator in the case of the *Ottoman Public Debt*, in his award of April 18, 1925,[3] gave an interpretation of the common intention of the signatory Powers to the Treaty of Lausanne relative to the exact date on which the responsibility of the former Ottoman Empire for its public debts should be regarded as having passed from it to the succession States as regards their new territorial acquisitions. In his opinion, the transfer to Greece of the responsibility for the part of the Ottoman public debt relating to Western Thrace ought to be dated not August 6, 1924 (the date when the Treaty of Lausanne came into force), as claimed by Greece, but August 9, 1920 (the date when the Treaty of Neuilly came into force), contrary, therefore, to the claim of Bulgaria, which tended

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[[1] Protocol relating to certain Concessions granted in the Ottoman Empire: *Treaty Series* No. 16 (1923), p. 203.]

[[2] Protocol concerning the Protection of Minorities in Greece: *Treaty Series* No. 16 (1923), p. 225.]

[3] *Recueil des Sentences arbitrales*, vol. i, pp. 544–556 [*Annual Digest*, 1925–1926, Cases No. 57 etc.]

rather to place the date of the transfer towards the period October–December 1919 (when the Bulgarian authorities were expelled from the region and Bulgaria was deprived of the resources of the territory).

" The Tribunal asked itself which considerations—similar or different—ought to govern the solution of the parallel question of the date on which there operated the subrogation of the two successive successor States, Bulgaria and Greece, in respect of the rights and obligations arising from the lighthouse concession as regards Western Thrace. The question is not of great practical importance, because the only lighthouse in that region appears to be that at Dedeagatch, but it has an undeniable theoretical interest. If the solution adopted by M. Borel, dictated by considerations appropriate to the transfer of public debts, was equally applicable to the transfer of rights and obligations arising out of concessions, Bulgaria ought to be regarded as the successor State in respect of Thrace from August 25, 1913 (the date of the coming into force of the Treaty of Bucharest, partitioning the former Turkish territories among the Balkan Allies) to August 9, 1920 (coming into force of the Treaty of Peace of Neuilly) and Greece since August 9, 1920. The Tribunal agrees with M. Borel in admitting that in any event the *co-imperium* of the Great Powers over Western Thrace, which lasted, at least *de jure*, from August 9, 1920, to August 6, 1924, cannot, in view of its fiduciary nature, be regarded as having involved the succession of those Powers to the duties and charges arising from the Turkish concession. On the other hand, the date of October 30, 1918, mentioned at the end of Article 9 of Protocol XII of Lausanne, is of no importance for the coastal region of Western Thrace, since that region had already been detached from Turkey in 1913. The date of the military occupation of Dedeagatch by Greek forces (May 27, 1920) can similarly not be decisive in law.

" The selection, then, lies between the two dates August 9, 1920, and August 6, 1924. In view of the fact that Bulgaria exercised no State authority over Western Thrace (Dedeagatch) after the coming into force of the Treaty of Peace of Neuilly on August 9, 1920, and that Greece, on the contrary, had exercised such authority since the anticipatory military occupation of the region by her forces towards the end of May 1920, the Tribunal sees no reason to differ, as regards the commencement of the subrogation of Greece in the lighthouse concession, from the Borel award concerning the decisive date for the calculation of the apportionment of the Ottoman Public Debt."

The Tribunal summarized its conclusions for the period 1912–1947 thus:—

" A. The mainland of New Greece:

" 1. Coastal region to the east of La Mesta (especially Macedonia and the Mount Athos peninsula) was detached from the

Ottoman Empire on May 30, 1913, by its cession to the Balkan Allies and assigned by them to Greece on August 25, 1913, after a nominal inter-Balkan *co-imperium*.

" 2. Epirus was detached from the Ottoman Empire after the constitution of the new Albanian State by the Great Powers on July 29, 1913, and Southern Epirus was assigned by them to Greece on December 19, 1913.

" 3. Western Thrace, having been detached from the Ottoman Empire on May 30, 1913, by its cession to the Balkan Allies and assigned at first by them to Bulgaria on August 25, 1913, was subsequently detached from Bulgaria on August 9, 1920, by its cession to the Great Powers and definitively assigned by them to Greece on August 6, 1924.

" B. The islands of New Greece:

" 1. The majority of the islands of the Aegean Sea (including the autonomous State of Samos) were detached from the Ottoman Empire and assigned to Greece by a decision of the Great Powers of February 13, 1914.

" 2. The autonomous State of Crete was definitively detached from the Ottoman Empire on May 30, 1913, by ' the disappearance of any political link ' between it and the Sublime Porte (Judgment of the Permanent Court of International Justice of October 8, 1937)[1] after the renunciation by the latter of the last remnant of the rights which she still possessed over the island in favour of the Balkan Allies and assigned thereafter by them to Greece, after a short period of quite nominal co-suzerainty, on August 25, 1913, at the latest.

" 3. Certain islands of the Aegean Sea situate at least three miles from the Turkish Asiatic coast (especially Paspargos) were detached from the Ottoman Empire and assigned to Greece by a decision of the Great Powers made on February 13, 1914, but were restored as from August 6, 1924.

" The island of Imbros and Tenedos never formed part of Greece, except on paper, but they remained under Greek occupation from 1912 to 1924.

" The Dodecanese was not included in the cession of 1913. It did not belong to Greece (except on paper) except from 1920 to 1922, but remained under Italian administration. It was not definitively ceded to Greece until 1947.

" The island of Castellongo was never part of Greece before it was ceded to her by Italy in 1947."

[III. *The Nature of the Proceedings*]—On a preliminary point arising out of the somewhat hybrid juridical character of the arbitration,

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[[1] *Lighthouses in Crete and Samos Case*: *P.C.I.J.*, Series A/B, No. 71; *Annual Digest*, 1935–1937, Case No. 49.]

Held: that although the present proceedings were conducted on one part in the interest of a private, French, firm, they were truly international in character. The submission to arbitration had been effected by the French and Greek Governments; the French Government had nominated one of the Arbitrators, had agreed with the Greek Government on the appointment of the President, and had appointed an Agent to represent it before the Tribunal.

The Court said: " From the text of the Convention of 1931, regarded as a whole, it appears from all the evidence that the present arbitration is clearly of an international nature, although it presents certain peculiar characteristics. In the first, judicial, stage of the dispute, the French Government clearly took the part of the firm—the only person for whom the point of law formulated in the first recital of the *Compromis* could have any interest; and the Greek Government consented to this in express terms. This common attitude of the High Contracting Parties did, it is true, for the second (arbitral) stage suffer certain attenuations, but the latter did not modify essentially the international nature of the proceedings, nor the scope of its submission to an international tribunal. In fact, during this second stage also, just as in the first, it was the two High Contracting Parties, that is, the Government of the French Republic and the Greek Government, and not the Greek Government of the one part and the firm of Collas & Michel of the other part, who, in the words of the *Compromis* itself, ' have agreed to submit . . . the pecuniary claims in question to an arbitral tribunal'. It is thus obviously for the French Government to continue, according to the *Compromis*, even after the finding of the first fundamental point of law by the Permanent Court of International Justice, to support the French firm before an international tribunal which it was to set up in collaboration with the Greek Government. And what it declared, in the final recital and in Article 7 of the *Compromis*, that it intended to do, it has in fact done, by nominating one of the arbitrators, M. Achille Mestre, by agreeing with the Greek Government on the appointment of the President and by officially notifying the latter, through the French Ambassador at The Hague, of the appointment of M. Rousseau as French Agent in quite unequivocal terms—see the letter of December 17, 1953:

" ' M. le Professeur,[1]

' With reference to previous correspondence concerning the case of the Lighthouses of the former Ottoman Empire I have the honour to inform you that the French Government has decided *to appoint an agent to represent it before the Arbitral Tribunal.*

' M. Charles Rousseau, Professor of Law at Paris, has been appointed to perform that function.'

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[1] *I.e.*, Professor Verzijl, President of the Tribunal.]

"It was therefore quite normal for M. Rousseau, when on January 31, 1954, he transmitted to the Tribunal Collas & Michel's first memorandum—which did in fact emanate from the firm, in accordance with Article 7, § 4, of the *Compromis*—to do so in his capacity as Agent of the Government of the French Republic. In view of [this and other] official communications, which express the will of the Government in question and which bind it, there is no possible doubt that this arbitration is clearly of an international character. This conclusion is confirmed by the fact that the two High Contracting Parties have, in Article 7, § 6, of the *Compromis* provided in express terms that the Tribunal shall conform to the rules for proceedings by arbitration contained in Chapter III of Part IV of the Convention for the Pacific Settlement of International Disputes, signed at The Hague on October 18, 1907, rules which cannot, for the most part, be applied except on the hypothesis of a truly international dispute. . . .

"The Tribunal has already alluded to a particular feature of this arbitration, namely, the presentation of claims on the French side by Collas & Michel. Another special feature lies in the fact that the Greek Government, for its part, has pecuniary claims to formulate against that firm, claims for which the French Government cannot be responsible. This particular point would have raised delicate questions if the [calculation] of the sums eventually found to be due from each side had resulted in a credit balance in favour of the Greek Government.

"Thus defined, the character of the present arbitration permits certain conclusions to be drawn. It follows, then, that the French Government, represented by its Agent before the Tribunal, must appear as *dominus litis*, empowered if necessary to withdraw certain claims, agree to a settlement, . . . etc., and that, on the other hand, the Tribunal can require the production by the Greek Government of certain documents and ask it to furnish the Tribunal with everything necessary for the purposes of the case (Articles 69 and 75 of the Convention of 1907)."

[IV. *The defence of prescription*]—At an early stage in the proceedings, Greece raised a plea of prescription in regard to certain of the claims.

Held: that the plea must fail. It was impliedly excluded by the *Compromis* of 1931 and also by the history of the relations between the Greek Government and Collas & Michel.

The Court said: ". . . This is a defence which is general in its nature and which applies to a large number of claims forty years old or more. As a defence of a general nature, based upon considerations of public international law, it cannot be accepted, seeing that the *Compromis* of 1931 clearly intended to submit to arbitration all the claims on both sides pending at that time, and that [therefore] no more prescription was possible after the conclusion of the *Compromis*.

" [Some of the contentions of Greece on this point were based on prescriptive periods fixed according to Greek law.] This defence cannot stand, either. Some claims arise out of acts done by agencies of Greece as occupying Power. These claims cannot in any event come within the provisions of Greek law; they depend entirely on international law. Other claims, on the contrary, arose in effect under the Greek legal system and would in theory have necessitated examination in the light of local legislation. The history of the origin of the present arbitration appears, however, to the Tribunal to exclude the admissibility of a defence of a general nature based on the Greek law relating to prescription.

" In the troublous conditions of successive wars between 1912 and 1923, the parties evidently preferred with a common accord to leave their claims in suspense until an eventual settlement of the outstanding questions as a whole. Nothing in the origins of the *Compromis* indicates that there was reserved the possibility of raising a plea of prescription for delay under municipal law. Rather was it intended to submit to arbitration the totality of claims which had been pending for many years. In those circumstances, the Tribunal cannot admit as well founded, even for that kind of claim, a general plea of prescription under Greek law. [It was significant that there had been no defence of prescription for specific claims.] . . .

" Similarly with the alleged default of Collas & Michel in not having in certain instances invoked or exhausted local remedies. It it true that the pleadings contain a tacit reference to such a default, but that reference is quite unspecific. It would, moreover, be contrary to the intentions present at the origins of this arbitration, which shows no indication that the parties meant to admit the possibility of invoking *a posteriori* the customary rule relating to the non-exhaustion of local remedies. That being so, the Tribunal interprets the *Compromis* as having intended to exclude from the outset any reliance on that rule. . . ."

[V. *The possibility of a lump sum judgment* ex aequo et bono]—It had been suggested that the Tribunal should deal with the multiplicity of reciprocal claims by a judgment *ex aequo et bono* by awarding a gross lump sum to the party which appeared to have the larger claims.

Held: that it was not open to the Tribunal to do this. The parties had given no indication that they wished the Tribunal to take such a course and the Tribunal was therefore not competent to do so. The Tribunal said: " Since (i) the competence to deal with a case *ex aequo et bono* can be neither presumed nor accepted without some indication from the parties that they so desire it; (ii) since on the contrary, the parties gave very little response to the invitations from the Tribunal to modify their views in an endeavour to reach a compromise settlement [*une solution moyenne*]; and (iii) seeing that the parties by their attitude have shown that, for different reasons, they do not wish to accept seriously as an approximate basis for a settlement the grand total in English pounds which was the object of certain negotiations in 1938, the Tribunal does not regard itself as entitled to adopt that course."

[VI. *The time of execution and the appointment of experts*]—The Tribunal then dealt with the questions of (*a*) the time of execution of its award and (*b*) the appointment of experts.

Held: (*a*) that execution of those parts of its award which were final should take place forthwith; and (*b*) that the Tribunal would not appoint experts unless the parties failed to do so.

The Tribunal said: "The Tribunal has naturally asked itself, when considering the consequences of the execution of the award in relation to the claims which have definitively succeeded, if it would not be as well to order the execution to be postponed until the pronouncement of the final award. It has not done so: it appears, in fact, from the examination of the case as a whole, and in particular of the adjourned French claims, that the sums which still remain to be awarded on those claims of which the principle has been accepted, would not be smaller than those which can be awarded Greece under her counterclaims. . . .

"As regards the claims for which the Tribunal has ordered further particulars, the latter will take the form of the production of evidence or of experts' reports. The evidence which the Tribunal expects must be produced within the various times which it has specified. As regards the experts' reports, the Tribunal has deemed it opportune not itself to appoint the experts. It has given the parties a fixed time in which to proceed to that appointment. In default, it will be effected by the Tribunal.

"In the meantime, the parties will be able by an amicable agreement, with a view to avoiding the prolongation of the litigation and additional costs, to reach a solution, in part or whole, of the outstanding questions."

[VII. *Currency and method of payment. Interest*]—Finally, the Tribunal dealt with (*a*) currency and method of payment, and (*b*) interest.

Held: (*a*) that in view of the number of currencies involved in the various claims, and for simplicity, the currency of payment must be the present-day French franc, that being the currency used throughout by Collas & Michel. The sums awarded must be paid by February 28, 1957, in Paris, in francs, to the French Government for payment to Collas & Michel. (*b*) No interest was, in general, payable, in view of the method adopted in dealing with the question of currencies and also because of the terms of the *Compromis* which appeared to exclude any addition to the amount of compensation claimed; but interest at 6 per cent. per annum would be payable as from the date fixed for the execution of the definitive award.

The Tribunal said: " *Currency and method of payment.*—During these proceedings, the parties assessed the various amounts claimed by them, especially for damage suffered, unpaid debts and profits lost, in different currencies according to their origin, and they converted into different currencies the totals of the sums in which each party applied to the Tribunal to condemn the other.

" After having, in her statement, first converted the total of her claims into French francs (called ' Poincaré francs of 1926 '), France, in her counter memorandum, changed her method and substituted the American dollar for the French franc. For her part, Greece adhered in principle to her national currency, the drachma.

" The various grounds of damage had their origin in very different currencies—Turkish, Greek, French, American, English, even Swedish, or even in quite special currencies such as the Constantinople caimé, or the ' metallic drachma ', according to whether it was a matter of the seizure of takings, the purchase of material, essential repairs, travelling expenses, back-payments or re-valuations. Almost all these currencies have undergone considerable devaluation in the course of the period during which the events which gave rise to the various heads of damage occurred.

" It will therefore be necessary to convert the total amounts to be awarded to the parties into one single currency. To that end, the Tribunal can, in this case, take into consideration two currencies only—the present-day drachma, the currency of Greece, and the present-day French franc. The final resulting balance being in favour of the firm of Collas & Michel, the question arises whether it is the money of the debtor or of the creditor which ought to be chosen. The Tribunal is of opinion that it is the present-day French franc which should be adopted as the currency of payment; it is the currency in which the firm undertook all its operations and kept all its accounts.

" When examining *Claim No.* 27 (redemption of the concession),[1] the Tribunal explained the reasons why it had adopted for that claim the method of converting first into American dollars the totals of the net profits of the concession, which were expressed in their original currency, and then converting the total sum in dollars thus obtained into French francs at the dollar rate at the date when the definitive award assessing compensation was to be given.

" The Tribunal adopts this system similarly for all other claims and for the successful counterclaims. Indeed, for most of them, the reasons for deciding in that sense are the same. Moreover, by reason of the interdependence of the claims presented by both sides, it appears to the Tribunal that the same method ought to be applied uniformly.

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[1] See *supra*, p. 299.]

" For the claims the amount of which can be fixed at once, this system will be put into effect without more delay. For all other successful claims, the Tribunal has proceeded to the immediate conversion of the amounts, awarded in their currency of origin, *via* the American dollar into present-day French francs. [Here follows a table, showing results expressed in French francs as at July 24, 1956, of these calculations in a large number of the claims.]

" Payment of the sums thus established should be made in Paris in francs.

" The sums awarded and to be awarded subsequently to the firm of Collas & Michel are to be remitted to the French Government for payment to the parties entitled thereto.

" The Tribunal deems it proper to allow to the debtor a period of time for payment; that will expire on February 28, 1957. During the period between the signing of this award and the effective payment, legal changes may occur in the currency of the States mentioned—the United States of America and France. Should such changes occur, the Tribunal regards it as equitable—the period of time being accorded in favour of the debtor—not to make the creditors bear the unfavourable consequences of such an occurrence. In that case, it will have to take into account, in regard to the payment, the consequences of the above-mentioned modifications.

" *Interest.*—It remains to examine the question, fully discussed in the course of the proceedings, whether interest is payable on the sums awarded to the parties.

" The Tribunal remarks in the first place that in this field no more than in many others do there exist strict rules of law of a general nature which prescribe or forbid the award of interest. The Tribunal cannot therefore accept the arguments of the two Agents who refer to the matter, although in opposing senses. Here again, the solution depends largely on the character of each individual case.

" If the Tribunal had adopted the method of fixing the amount of the debts, at the time of their origin, in the currencies of origin, and consequently of allowing the effect of the devaluations of those currencies to fall on the parties, there would have been some reason to allow the latter to benefit similarly from interest. If, on the other hand, the Tribunal had proceeded from the idea that Collas & Michel, the moneys owing to them having been paid immediately, had invested in gold the sums thus received in order to protect themselves against all risk of devaluation, the award of interest would have been illogical.

" Nor is there in the system of compensation which the Tribunal finally adopted any reason to award interest in addition to the capital sums awarded. Indeed, the basic idea of that system consists precisely in determining in a present-day currency the actual value which the debts had in the past in their currency of origin. In expressing this actual past value as exactly as possible in terms of present-day currency, the Tribunal deliberately excluded all the vicissitudes of the currencies of origin. It has, so to speak, thrown a bridge across the stirring period of the years which have elapsed and placed itself consciously in the present. In these circumstances, justice as well as logic require that no interest covering the past be awarded.

" The Tribunal is of opinion that in deciding thus, it is also conforming to the common intention of the parties at the date of the *Compromis* which instituted the present arbitration. That common intention consisted of assuring to the parties compensation corresponding exactly to the damage suffered—nothing more and nothing less.

" There can therefore be a question only of awarding interest commencing to run from the date fixed by this award for its execution. The rate is fixed at 6 per cent."

[Report: *Protocoles des Séances, Ordonnances de Procédure et Sentences avec Annexes du Tribunal d'Arbitrage constitué en vertu du Compromis signé à Paris le* 15 *juillet* 1931 *entre la France et la Grèce* (*Affaire des Phares*).]

Arbitration—In General—The Arbitration Treaty—Interpretation of—Implied Exclusion of Award of Costs—Intention of the Parties.

See p. 680 (*Lighthouses Arbitration between France and Greece—Claim No.* 24).

Arbitration—Appointment of Arbitrators—Appointment of Arbitrator by Third Party in Default of Appointment by Respondent—Arbitration under Universal Postal Convention of Paris, 1947.

See p. 591 (*Re Dues for Reply Coupons Issued in Croatia; Re Transit Charge for Mails from Occupied Yugoslavia*).

II.—Procedure

i.—Procedure before the Tribunal (Oral and Written Arguments)

Arbitration—Procedure—Reference to Earlier Arbitration on Related Matter.

See p. 659 (*Lighthouses Arbitration between France and Greece*), at pp. 667–668.

Arbitration—Procedure—Plea of Prescription—Rejection of—Implied Exclusion by Terms of *Compromis*—Exclusion Implied by History of Relations between the Parties.

See. p. 659 (*Lighthouses Arbitration between France and Greece*), at pp. 671–672.

Arbitration—Procedure—Reference to Earlier Award by Conciliation Commission on Related Matter.

See p. 299 (*Lighthouses Arbitration between France and Greece—Claim No. 27*).

ii.—Competence. Competence to Determine Jurisdiction

Arbitration—Procedure—Competence of Arbitral Tribunal—Distinction between Claim Based on Article in Treaty Providing for Reference of Difference to Experts and Claim Within Terms of *Compromis*.

See p. 342 (*Lighthouses Arbitration between France and Greece—Claim No.* 26).

Arbitration — Procedure — Competence of Arbitral Tribunal — Competence to Determine Jurisdiction—Arbitration under Universal Postal Convention of Paris, 1947.

See p. 591 (*Re Dues for Reply Coupons Issued in Croatia; Re Transit Charge for Mails from Occupied Yugoslavia*).

iv.—Practice

Arbitration—Procedure—Practice—Burden of Proof—Evidence in Possession of Defendant—Relief of Claimant from Requirement of Strict Proof.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claim No. 6.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *supra*, p. 659). This claim related to the collection of lighthouse dues by the Greek authorities themselves in certain new island agencies created by them after 1913. These new agencies were established only in certain small ports where Collas & Michel did not have agents, notably: two on the Isle of Nicania, three on the Isle of Thasos, and one on the Isle of Imbros. The Greek authorities, in the official declaration under which they collected the lighthouse dues through those agencies for the account of the firm, at first recognized the rights of the firm, but they neglected not only to transmit the dues thus collected, but also to collate, as requested by the firm, data relating to the amounts received and to the routes of the ships, which were necessary for the subsequent settling of accounts. Repeated applications for an account and for payment were unsuccessful.

The firm had been able to trace part of the collections made by Greece; although the total must have been greater, it was admitted that it could not have been a very large sum as the ports were of little importance and the traffic there was of modest proportions.

Held: that the claim must succeed, despite the paucity of evidence as to the amount owing by the Greek Government.

The Tribunal said: " . . . In these circumstances, it would be unreasonable, and contrary to law, to require of the firm strict proof of the amounts which it lost under this head; it is rather for the Greek Government to provide now the necessary information." The Tribunal based its award on the sum which the firm had established as having been collected.

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 97.]

Arbitration—Procedure—Practice—Admission of Late Claim—Special Circumstances.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claim No. 10*a.*

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *supra*, p. 659.) This claim concerned certain taxes improperly levied on Collas & Michel in respect of certain premises occupied by them. Some of the taxes had been remitted, and the firm now claimed the balance. The claim was originally included with Claim No. 10,[1] which concerned the illegal levying of customs duties, but during the hearing of that claim it became clear that the question of the taxes was quite separate from that of the customs dues.

Held: that in the circumstances of the case the claim could be admitted under a separate head as a late claim.

The Tribunal said: " Having regard to the extreme complexity of the claims on both sides, the excessively long time during which the claims dragged on from war to war, and the disorder caused by events to the respective administrations, the Tribunal showed itself, from the beginning, ready to admit in a liberal manner any supplemental documentary or other information which the parties might be able to furnish it—sometimes at its own request. The Tribunal has no objection to extending this liberality to the submission of certain new heads of claim which originally appeared to be either comprised in other claims or indissolubly connected with them. Consequently, the Tribunal declares Claim No. 10a admissible."

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[1] Not here reported.

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 114.]

Arbitration—Procedure—Practice—Sharing of Burden of Proof—Paucity of Evidence—Ordering of Enquiry—Refusal to Order Enquiry on Ground of Expense and Improbability of Good Result.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claim No. 14.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *supra*, p. 659.) This was a claim for compensation for damage caused to the buoy, which belonged to Collas & Michel, at Yeni Kalé (in the Gulf of Smyrna) in circumstances which are not very clear. The buoy was torn from its moorings on February 7, 1922, as part of certain measures of naval defence, consisting of the construction of a dam in the Yeni Kalé channel, carried out by the Greek naval authorities, who had landed at Smyrna on May 11, 1919. The Greek Government, in a letter dated March 14, 1922, declined all responsibility for the removal of the buoy, probably on the basis of a report from the Navy, who disclaimed all knowledge, but were unable to give any other plausible explanation, of the occurrence. The relative archives were subsequently found to have been destroyed.

Held: that the claim must fail. Virtually nothing was known about the reason for the removal of the buoy, and an enquiry, which " a reasonable sharing of the burden of proof " might require, would be both very expensive and unlikely to yield any good result.

The Court said: " The only possible way of attempting to verify after so many years the exact course of events would be to order an enquiry and to interrogate under oath the officers or other members of the Navy best placed even now to give information. . . . But the result of such an enquiry after more than thirty years would necessarily be problematic. On the other hand, the coincidence of the construction of the dam with the removal of the buoy, regarded from the point of view of probabilities, and the complete lack of any other explanation, seen in the light of a reasonable sharing of the burden of proof in such a case, could render inevitable, as an extreme measure, the decision to order an enquiry.

" The Tribunal did not, however, decide on such a solution, by reason, on the one hand, of the extreme improbability of any good results, and on the other hand, of the great expense which would be involved.

" In these circumstances, the presumptions urged by the firm of Collas & Michel in support of their claim, in default of any direct proof, do not suffice to convince the Tribunal.

" Claim No. 14 is therefore rejected."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 94.]

Arbitration—Procedure—Practice—Award of Costs—Exclusion by Rules of Procedure in Hague Convention for Pacific Settlement of International Disputes, 1907—Implied Exclusion by Terms of *Compromis*—Intention of the Parties.

Lighthouses Arbitration between France and Greece.

Claim No. 24.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

The Facts.—(See *supra*, p. 659.) Collas & Michel claimed from the Greek Government reimbursement of expenses which they had been forced to incur in the course of " successive and fruitless attempts to have the justice of their cause recognized " and to obtain just compensation for the losses which they had sustained cumulatively over a great number of years.

The claim comprised three groups of expenses: first, the costs expended by France, or by the firm, in defending the actions brought before the Permanent Court of International Justice in 1934 and 1937;[1] secondly, those incurred by the firm during the prolonged negotiations entered into in order to conform with Article 7 of the *Compromis* of 1931;[2] and finally, those occasioned by the present arbitration.

Held: that the claim must fail in respect of all three groups of expenses. The first group was a matter between Collas & Michel and the French Government; in any event the Permanent Court of International Justice had not ordered Greece to pay the French Government's costs of the proceedings before it and it was not for the Tribunal to do so now. The second group of expenses was not included among those with which the Tribunal was authorized by the *Compromis* to deal; and the Tribunal was precluded by the terms of the *Compromis* from awarding the costs of the present proceedings to either party.

The Tribunal said: " As regards the first group, the Tribunal cannot enter into the internal relationship between the French

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[1] See *supra*, p. 660, nn. 1 and 2.

[2] See *supra*, pp. 659–660.

Government and the firm regarding the costs of the proceedings above mentioned. The Tribunal can only point out that the Permanent Court of International Justice, although authorized by its Statute (Article 64) to order that Greece should pay all or part of the costs incurred by France, did not do so, and, in consequence, each party had to pay its own costs. It is not for the Tribunal to modify that decision.

" As regards the last group, the Tribunal is obliged by the *Compromis* (Article 1, paragraph 6) to conform, in this matter also, to the rules of arbitral procedure contained in Chapter III of Title IV of the Convention for the Pacific Settlement of International Disputes signed at The Hague on October 18, 1907. It is not for the Tribunal to decide on this point in a sense contrary to Article 88 of that Convention, which prescribes categorically that each party shall pay its own costs and shall share equally the expenses of the Tribunal.

" There remains the group of costs incurred by Collas & Michel during the prolonged negotiations undertaken with a view to reach an amicable settlement. Although the Tribunal believes that the negotiations were long drawn out by Greece and that they caused the firm needless expenditure, the Tribunal thinks that the *Compromis* signed in 1931 did not clearly express the common intention of the parties to include among ' all the pecuniary claims of the firm ' mentioned in Article 7, claims of this nature, so as to allow it to deal with them.

" Claim No. 24 is therefore dismissed."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 119.]

Arbitration—Procedure—Practice—Re-grouping and Analysis of Claims in Historical Order and According to Points of International Law Raised.

See p. 659 (*Lighthouses Arbitration between France and Greece*), at pp. 661–663.

Arbitration—Procedure—Practice—Inability of Claimants to Establish Amount of Loss—Award of Token Damages.

See p. 296 (*Lighthouses Arbitration between France and Greece—Claim No.* 5).

III.—Evidence

Arbitration—Evidence—Rules of—Burden of Proof—Allegation of Denial of Justice—Need to Prove Existence of Remedies Not Used—Contention that Available Remedies Ineffective—Test of Assumption of Truth of Facts Claimed.

See p. 306 (*Ambatielos Claim*), at p. 326.

IV.—The Award

Arbitration—The Award—Appointment of Experts—Competence of Tribunal to Give Lump Sum Judgment *Ex Aequo et Bono*—Necessity for Request from Parties—Time for Execution of Award.

See p. 659 (*Lighthouses Arbitration between France and Greece*), at pp. 672–673.

Arbitration—The Award—Currency and Mode of Payment—Changes in Currency After Signing of Award.

See p. 659 (*Lighthouses Arbitration between France and Greece*), at pp. 673–674.

Arbitration—The Award—Currency and Mode of Payment—Effect of Devaluation of Currency—Choice of Stable Intermedium for Calculation of Amount Awarded.

See p. 299 (*Lighthouses Arbitration between France and Greece—Claim* No. 27).

B—INTERNATIONAL COURT OF JUSTICE

II.—Contentious Jurisdiction

iv.—Judgment

Permanent Court of International Justice—Decisions of, Regarded as *Res Judicata*—Article 59 of Statute of the Court—Relevance of Distinct Nature of *Lis*—Relevance of Differing Basis of Previous Judgment—Relevance of Terms of *Compromis* Leading to Previous Judgment.

See p. 81 (*Lighthouses Arbitration between France and Greece—Claims No.* 11 *and* 4).

III.—Advisory Jurisdiction

ii.—Procedure

International Court of Justice—Advisory Jurisdiction—Necessity for Oral Proceedings—Equality of the Parties—Binding Force of Advisory Opinion in Conformity with Request—Whether Contrary to Statute of the Court.

See p. 517 (*Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization*), at pp. 521–524.

C—CONCILIATION

Conciliation—Conciliation Commissions—Practice of—Acceptance as Precedent of Decisions of Similar Commission Set Up under Peace Treaty.

See. p. 499 (*Palumbo Claim*).

PART XI

WAR AND NEUTRALITY

A—WAR IN GENERAL

I.—Definition and Technical Meaning of War. Belligerency and Insurgency

War—Meaning of—Hostilities in Absence of Declaration of War —The Korean Conflict—The Term " War " in an Insurance Policy.

WILKINSON *ET AL. v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

United States, Municipal Court of the City of New York, Borough of Manhattan, Second District.

May 7, 1956.

THE FACTS.—The insured, whose beneficiaries were the plaintiffs in this action, died in combat in Korea on July 14, 1953, while he was serving in the armed forces of the United States. The life insurance policy upon which this action was based contained a clause providing for an additional indemnity benefit in the event of death by accidental means, but the clause was subject to termination " . . . if the insured becomes a member of the military, naval or air forces of any country at war, whether declared or undeclared; . . ." When the defendant insurance company was informed of the death of the insured, it paid the face amount of the policy to the beneficiaries but refunded premiums paid for the additional indemnity coverage for the period subsequent to August 3, 1951, when the insured had entered the Army, and notified the plaintiffs that the additional indemnity coverage was not in force when the insured died. The plaintiffs brought this action for the additional indemnity benefit of $1000. The defendant moved to dismiss on the ground that the provision for additional indemnity had terminated when the insured entered the Army in 1951 and that the death of the insured was specifically excluded from coverage by the terms of the additional indemnity provision.

Held: that the motion to dismiss must be granted. The term " war " was to be taken in its ordinary sense as meaning war in fact, rather than war in its technical or legal sense. The insured having been killed in time of war, there could be no recovery on the accidental death provision of the policy.

The Court said: " As far as I have been able to ascertain, the courts of this State have not had occasion to consider whether the fighting in Korea is to be considered ' war, whether declared or undeclared' within the exclusionary provision contained in the life insurance policy. The question, however, has been presented in several other jurisdictions, both state and federal.

" On February 22, 1951, the Committee on Foreign Affairs of the United States House of Representatives released a report which officially stated that the operation in Korea was not a war (House Report No. 127), and it stated, ' No declaration of war has been made by the Congress. The President has not proclaimed a state of war, nor have the North Koreans or Chinese Communist authorities.' This being so, the question remaining to be decided is whether although not technically a declared war, the action in Korea constituted an undeclared war. The President of the United States from time to time characterized the fighting in Korea as a ' police action '.

" We must take the view that words are to be taken in their plain, ordinary, popular sense and that they are to be considered as they would be understood by the average man.

> ' Contracts of insurance . . . are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and proper sense.' *Johnson* v. *Travelers' Insurance Co.*, 269 N.Y. 401, 199 N.E. 637, 640.

" The likelihood of death by external, violent and accidental means is immeasurably increased by military service in time of war. In order to protect against this increased hazard, the policy here involved provided that the additional indemnity coverage was to terminate forthwith upon the entrance of the insured into the military service of any country at war. Our courts have held it to be entirely proper for an insurer to limit its liability in situations involving war risks. *Neidle* v. *Prudential Ins. Co.*, 299 N.Y. 54, 56, 85 N.E.2d 614, 615.

" While it is true that there was no formal declaration of war by Congress, there can be no doubt that the United States was engaged in a war in Korea as an actual fact.

" On June 6, 1951, the Attorney General held that Article VI, Section 120 of the Military Law providing for payment of an annuity to veterans disabled by blindness ' during any war ' should be extended to veterans blinded in Korea. (Report of Attorney General—1951—p. 112):

> ' The magnitude and actuality of the conflict in Korea, its pervading effect upon the national security and interest, together with the demands created thereby upon the nation as a whole are too apparent to need recounting. . . . They require the conclusion that the Korean hostilities constitute a war for the purpose of determining eligibility under Military Law, Section 210, for the assistance intended thereby for war veterans disabled by blindness.'

" In *Podos* v. *Equitable Life Assurance Society*, 1 Life Cases

C.C.H.2d 757, which involved a similar state of facts and this identical policy coverage (case decided in the District Court of the United States for the Southern District of California on March 15, 1954), it was stated,

'Recovery has been denied in the state courts and in a federal court for this district where the policy did not use the word "undeclared" but merely excluded a death occurring in time of war.'

"Thus it appears that the Court held that the Korean conflict was an undeclared war.

"Reference has been made to two Pennsylvania cases, *Beley* v. *Pennsylvania Mutual Life Ins. Co.*, 373 Pa. 231, 95 A.2d 202, 36 A.L.R.2d 996, and *Harding* v. *Pennsylvania Mutual Life Ins. Co.*, 373 Pa. 270, 95 A.2d 221, both decided by the Supreme Court of Pennsylvania.[1] In those cases, the Court held that since there had been no formal declaration of war, the Korean fight was not to be considered war. The exclusionary language, however, was not nearly as specific or precise as in this case. It merely excluded death resulting from military service in time of war, without the addition of the words 'whether declared or undeclared'. The majority opinion in the *Beley* case suggests that there would have been a holding to the contrary if the words 'declared or undeclared' had been added.

"To hold that under the provisions of this policy the Korean war is not war in the face of 128,000 American casualties is so unrealistic and legalistic as to be utterly unjustifiable, and we cannot shut our eyes to what everyone knows, that there has been, and was when the insured was killed, actually and in reality a war in Korea in which the United States has been seriously engaged. It is clear that nothing in the question of insurance involved herein suggests that the word 'war' is used in its technical or legal sense. It is clear that the plain, ordinary and generally accepted meaning of the word 'war' is war in fact. It is clear that there was war in fact in Korea when the insured was killed and that he was killed in 'time of war'.

"It follows that there can be no recovery under the accidental death provision of the policy."

[Reports: 2 Misc. 2d 249; 151 N.Y.S. 2d 1018.]

War—Meaning of—Whether Only Existence of State of War Can Confer Enemy Status on Individuals—Status of Roumanian Citizens in France during Second World War—Dispossession of Roumanian Citizens—Whether Such Citizens Entitled to Benefits of Inter-Allied Declaration of January 5, 1943, Invalidating Acts of Dispossession.

See p. 758 (*Cohen-Klarsfeld* v. *Pouchard-Stopt*).

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[1] These two cases are noted in *International Law Reports*, 1953, p. 585.]

War—Definition of—War Risks Clause in Charterparty—Whether Limited to Risks Involving Exercise of Belligerent Rights—Hostilities Conducted by Unrecognized Government—Cargo Discharged by " Government in Formosa ".

See p. 71 (*Monta of Genoa* v. *Cechofracht Co., Ltd.*).

V.—Effects of Outbreak of War

ii.—On Treaties

War—Effect on Treaties—Treaty of Amity, Commerce and Navigation—The Law of Canada.

See p. 459 (*Francis* v. *The Queen*).

iii.—On Private Contracts

War—Effects of Outbreak of—On Private Contracts—Effect of Declaration of War by Burma on Great Britain.

See p. 787 (*Chettiar* v. *Chettiar*).

iv.—On Enemy Subjects with regard to

(b) THEIR PROPERTY AND OTHER RIGHTS

War—Effects of Outbreak of—On Enemy Subjects with Regard to Their Property—Effect on Credit Balance of Enemy Bank with a National Bank Payable to Custodian of Enemy Property—Status and Functions of Custodian of Enemy Property—Whether a Substitute for Enemy Owner—Nature of Legislation Relating to Trading with the Enemy—Belligerent Occupation—Liquidation of Bank by Belligerent Occupant—Rights of Belligerent Occupant—Right to Liquidate Property—Liquidation as Distinguished from Confiscation—Hague Convention No. IV—Articles 43, 46 and 48—Obligation of Occupant to Respect Local Law—Obligation to Respect Legislation of Opposing Belligerent Relating to Trading with the Enemy—Regulation of Currency and Banking—Treaties of Peace—Interpretation by Municipal Courts—Administration of Occupied Territory by Occupant After Cessation of Hostilities—Whether Covered by Terms of Peace Treaty Referring to Action " in the course of prosecution of the war "—Whether Treaty of Peace Confers Rights on Individuals.

PUBLIC TRUSTEE *v.* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA.

Singapore, Original Civil Jurisdiction. February 21, 1956.

(Taylor J.)

THE FACTS (as summarized by Taylor J.).—" This action arises out of the Japanese occupation of British territories during the war.

" The plaintiff is the Custodian of Enemy Property. The defendants have branches in Singapore, Hong Kong and many other places; their Singapore branch functions as a local clearing bank.

" The Yokohama Specie Bank, referred to in this litigation as the Y.S.B., was incorporated in Japan, and had branches in Singapore, Hong Kong and other places. When Japan entered the war, the Singapore branch had a credit balance of nearly $4,000,000 with the defendants. This amount was *prima facie* payable to the Custodian and he drew $3,000,000 leaving a balance of about $780,000 which unavoidably remained in suspense during the war and for several years afterwards. Meantime the defendants learned that during the enemy occupation certain moneys belonging to their branches in Hong Kong and other places had been collected by, or paid to, the Y.S.B. in those places. The defendants claimed to set off the equivalent of these moneys against the Singapore balance and the Custodian disputed their right to do so. The Custodian now sues for that balance and the defendants counterclaim for a declaration that they are entitled to recover the amount of those moneys from funds of the Y.S.B. which have devolved on the Custodian.

" Japan entered the war on 8th December, 1941, and on 12th December the Under Secretary, exercising powers corresponding to those of the Board of Trade, made a Restriction Order under section 4A of the Trading with the Enemy Ordinance, appointing the Custodian to be Controller of the business of the Y.S.B. in the Colony.

" About 15th December Japanese forces bombed and occupied Penang. On Christmas Day they occupied Hong Kong. On 15th February they occupied Singapore and at about the same time they occupied Kuching, the capital of the State of Sarawak in Borneo. These territories were liberated soon after the surrender of Japan in August 1945. Thus for about three years and a half they were enemy occupied territory and, apart from a few air raids, were never again a theatre of active military operations.

" The capitulation and occupation of Singapore were carried out with little damage and disorder. The Japanese quickly organised local government. Nearly all British and Allied nationals of European race were interned within a few days. The Japanese appointed a Custodian who took over the office and staff of the Custodian of the Colony and preserved his records. Speaking very broadly they administered enemy property on British lines.

" The Y.S.B. quickly recommenced business, but not in the same building. After a few weeks the Chinese banks, which are incorporated locally, and the branches of Indian banks, were allowed to resume business, subject to restrictions. The branches of the defendants and similar banks were subjected to a form of liquidation but most of their books and documents were carefully preserved. In 1945 their senior officers returned, reassembled most of the pre-war local staffs, reconstituted their accounts and resumed business. The balance of $780,000 to the credit of the Y.S.B. clearing account still existed and the Custodian claimed it.

" In 1951 a general Vesting Order was made under section 8 of the Trading with the Enemy Ordinance, expressly vesting in the plaintiff enemy property, including by Article 3 (*a*) property which is the subject of a Restriction Order.

" In his statement of claim the plaintiff sets out the history of the account, the Restriction Order, his predecessor's appointment as Controller thereunder and the General Vesting Order of 1951, and claims a declaration that he is entitled to the balance, payment of the amount, with interest, or alternatively an account or damages."

Held: that the claim of the Custodian must succeed, and the set-off and counterclaim fail. (1) On the outbreak of war the credit balance of an account of an enemy bank with a British bank became payable to the Custodian of Enemy Property, without demand, but claims against the enemy bank, not being debts due in the same right, could not be set off; (2) a belligerent Power in effective occupation of territory could lawfully liquidate the branches of banks whose business could not be carried on, if it was reasonably necessary to do so for the preservation of the assets or for the orderly administration of the territory; (3) a Custodian of Enemy Property is appointed by his own Government with purely statutory functions to preserve the property of enemies during the war and to hold the property, or its proceeds, available for whatever arrangements may be made at the conclusion of the peace; he is accountable only to his own Government, and is not an agent or representative of a particular enemy.

The Court, after stating the facts, said in part: " The argument for the defendants is a series of independent propositions, most of which are separately contentious, apart from the question whether, if correct separately, they lead to the suggested conclusion. The submissions are as follows:

" The account of the Y.S.B. with their Singapore branch is subject to the incidents of an ordinary current account between banker and customer; money in such an account is repayable only on demand; the bank is entitled to set off moneys due from the same customer at the date of demand, even if the cross-demand arises in a different country. War apart, the defendants would have been legally entitled to dishonour a cheque drawn by the Y.S.B. on that account after such a cross-claim as is now alleged had arisen; the necessity for demand survives the war and affects the Custodian; the Custodian has no greater rights than the Y.S.B. would have had, if they were now claiming the same balance;

the Custodian is not entitled to pool the whole of an enemy's assets; he must first discharge the liabilities of the particular enemy and pool only the surplus, if any. The Custodian has no better rights than the Y.S.B. would have had if there had been no war. The Y.S.B. were not legally or lawfully entitled to liquidate any of the defendants' branches, even if the Japanese Government purported to order or authorise them to do so, because a belligerent occupying enemy territory during a war has no such power, in international law; even if it was an Act of State, that would not afford a defence to the Y.S.B. if they were now claiming the balance.

" These arguments must be examined seriatim. They fall into four main groups, first the relation of banker and customer apart from war, secondly the position of the Custodian in the first phase, when he deals with the property of new enemies, thirdly the position of the Custodian in the second phase when he is winding up after the war and fourthly the issues of international law."

The relation of banker and customer apart from war.—" The first main point is that where a customer has current accounts with different branches, the bank can set off a deficiency in one against a credit in the other. This proposition is founded on *Garnett* v. *M'Kewan*[1] where the customer had, without pre-arrangement, overdrawn his account at branch A and the bank dishonoured his cheque on branch B on the ground that the total funds in their hands were insufficient. It is expressly stated in the judgment of Kelly C.B. that there was no arrangement, either express or implied from the course of dealing, that the two accounts were to be kept separate. This qualification is vital. If there is any such arrangement the banker has no such right to set-off, *Greenhalgh* v. *Union Bank*[2] at page 164.

" Where the right of set-off exists, it is a right to offset a debit balance on one account against a credit in another account held by the same customer in the same right. There is no authority for the proposition that this right of set-off, or the banker's general lien, extends to a claim which is not an actual debt, and which has not been, and could not properly be, debited to a current account.

" Suppose a vehicle belonging to Y.S.B. had crashed into the defendant's office at Lorenzo Marques, both banks having branches there but there being no account between them, and the defendant's Singapore manager had refused to pay local cheques sent to him for clearing on the ground that his Lorenzo Marques colleague attributed the damage to negligence of the Y.S.B.'s driver and estimated the amount at a sum exceeding the Singapore credit balance, what would the position have been ? The Y.S.B. could certainly have sued the defendants in Singapore for damages for breach of the contract to operate the clearing account on the grounds that the alleged cross demand was unliquidated, that the defendants had assessed their own damages, that they had failed to prove the amount and that it was not a debt which could be debited to a current account. Now leaving aside the question whether there was any agreement to keep the clearing account separate, the other points are valid. In such an event the defendants should first have sued in the Portuguese court to establish their claim and reduce it to an actual debt. Until they had done that none of the other questions would properly arise.

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[1] (1872) L.R. 8 Ex. 10.

[2] [1924] 2 K.B. 153.

" This account was not an ordinary current account. It was a clearing account and it is necessary to infer that there was an express or implied condition that the defendants would keep it separate, otherwise local cheques drawn by customers of the Y.S.B. who were in credit with that bank would have been liable to be refused clearance in consequence of a debit balance arising in an account of the Y.S.B. in the books of the defendants in another country. Under the ordinary law, therefore, the defendants could not properly set off against this account, claims against the Y.S.B. arising independently of clearing."

Status and function of the Custodian of Enemy Property. The Custodian and new enemies.—" The second group of arguments concerns the war legislation. The Custodian is not a trustee, nor an agent, nor a receiver, though in part his functions resemble each of these. He is *sui generis*. He is an officer appointed by his own Government to preserve the property of enemies during the war and to hold the property, or its proceeds, available for whatever arrangements may be made at the conclusion of peace. For this purpose the term ' enemy ' has an extended meaning which includes British and allied nationals on the opposite side of the line of war. The statutory provisions regarding property, however, do not distinguish in any way between the different classes of enemy. From the point of view of the Custodian a German in Germany and an Englishman in Germany are, during the war, subject to exactly the same legal disabilities. No one can possibly say what arrangements for return of property to individuals, for pooling of assets and offsetting of liabilities will ultimately be made.

" This is well illustrated by the recent case of Italy. At their declaration of war the Italians were aggressors, like the Germans, and were regarded with equal hostility. After the victory in Tunis when the Fascists were discredited and the Allied invasion of Italy was imminent, the British Government worked hard to make the Italians change sides. In that situation it might well have been a matter of the first importance to announce, perhaps with lists, that they were able and ready to return immediately all private property in their custody to Italian owners. The Custodian must be prepared for such an event. He must conduct this part of his affairs as though he were a trustee for the individual enemies, keeping separate accounts, keeping down local charges, and so on, but that does not make him a trustee or an agent for them.

" It is true that the Custodian has no higher rights of property than the enemy owner. For example, where he takes over a building mortgaged to a neutral and leased to an ally he takes it subject to those liabilities and he must see that the rates are paid lest the City Council force an adverse sale. For these purposes he may be said to stand in the shoes of the enemy owner but he does not stand in them for all purposes. He does not take over the property as a representative of the owner. He takes in an independent statutory right of his own which, though no higher, is a different right. In particular he does not succeed to the enemy's contracts. He may continue a local contract for beneficial completion but in the majority of cases further performance is impossible and the Custodian's function is to wind them up as at the date of disruption.

" The fact that the Custodian was also the Public Trustee may have enhanced his trustee-like appearance but it did not affect his position in law, which was exactly the same *vis à vis* enemies of all classes. The Public Trustee was chosen to be the Custodian for two main reasons: he had the right kind of accounting and managing organisation to perform the extremely complex set of tasks and his corporate capacity solved many technical problems. He was not, however, acting under the Public Trustee Ordinance; he could not do so. Nor was he acting under the Trustees Ordinance or under the law and equity applicable to ordinary trustees. He was performing the statutory functions of the Custodian and no others . . .'

Rights of Occupant in regard to banking accounts.—" The next part of the argument concerns the position of the Y.S.B. in the enemy occupied territories. The submission is that, in international law, the Japanese Government could not lawfully order the liquidation of the defendants' branches, and therefore any purported order is void and the Y.S.B., as bankers, are responsible to the defendants for the funds they handled.

" The position of a belligerent State occupying enemy territory during a war differs from that of a State exercising sovereignty in its own territory. The Hague Convention of 1907, which was ratified by Japan, provides by articles 43, 46 and 48 that where the military occupation is effective, as was certainly fully established in Malaya, the power of the occupied State passes into the hands of the occupant who must respect the laws in force in the occupied territory, unless absolutely prevented. He must respect private property. He is permitted to take possession of State funds and he may collect the ordinary taxes to defray the costs of his administration but he must not confiscate private property.

" These provisions raise several relevant points. First, as to the local laws. The Convention does not say that they are deemed to remain in force unaltered. It says that the occupying forces must respect them ' unless absolutely prevented '. This qualification refers to the doctrine that absolute military necessity may excuse a breach of the laws of war and that the military commander of the area must be the judge of what the safety of his troops requires.

" The Convention imposes on the occupying authority a duty to respect the local laws but it does not require him to enforce or administer them. Such a requirement would be impracticable. Much is left to discretion and necessarily so because circumstances vary greatly, not only in different instances but also in any one territory at different stages of the same occupation. The Convention is not exhaustive. A breach of any Article is an offence against the laws of war (unless the infringer can show overriding military necessity) but it cannot be said that anything not expressly authorised is forbidden, by implication. Article 43 empowers the occupant to make additional laws and regulations to ensure public order and this must be interpreted in relation to the occupation, for more than three years, of the whole of a country remote from any theatre of operations.

" This part of the case raises two distinct issues which ought to be kept separate. Confiscation is one thing. Liquidation is another. One may liquidate without confiscating. It is not likely that anyone would liquidate with a view to confiscating the surplus; a predatory mind would collect assets and ignore liabilities. One might, of course, change one's mind and having liquidated resolve to confiscate the surplus, but that would be a separate act. It is clear that the Japanese authorities in fact liquidated the defendants' branches, though perhaps not to completion. One question is whether this liquidation was lawful. Whether they confiscated the surplus is another question, primarily one of fact.

" In general, the local laws continued in force during the enemy occupation but the Trading with the Enemy Ordinance must be an exception. Its paramount provision is the definition of an enemy as a State at war with His Majesty, meaning for the present purpose, Japan, then at war with King George VI. It is absurd to suppose that after the Japanese had established their occupation of Malaya they were, even in theory, expected to keep their own property in custody or to refrain from trading with the inhabitants. That particular statute was necessarily suspended. It is wholly fallacious to suggest that on the occupation the Ordinance automatically underwent a ' Through-the-Looking-Glass ' process which converted it into a reciprocal law with the United Nations as enemies. It is possible to imagine an occupying power taking such a statute as a basis, re-writing it *mutatis mutandis*, and procuring its enactment by a subservient legislature. Something like this might have been done, say, in Vichy France, but it was not even theoretically possible in the Straits Settlements where the legislature was necessarily in total abeyance. The only other legislative solution would be for the occupying power to enact their measure as a proclamation. Alternatively, they might carry out a similar policy by purely administrative means. The Japanese in fact adopted a combination of the last two methods. They had extremely few officers who had any legal training, even in Japan, but they had a genuine administrative machine. They assumed, rather than declared, a body of law relating to Custodianship and carried it on by means of the British Custodian's staff, under overall supervision by their own officials, making occasional general orders of a quasi-legislative nature, one of which was proved in *Yeap* v. *Kop*.[1]

" It was a practical necessity, and within their legal power and duty under Article 43, for the Japanese to provide for and regulate matters of currency and banking so that the population could live orderly lives. In their judgement it was necessary to intern European staffs and in any event very little of the business of such banks as the defendants could have been carried on. They were bound to respect the private property of such concerns and concurrently they were bound to respect the private property of the local inhabitants who were not interned, which property included hundreds, probably thousands, of balances, held to their credit in the books of the defendants, and similar banks, at the commencement of the occupation. It was essential for the Japanese to find some means of paying out these credit balances to the free inhabitants, in short to liquidate them. They needed funds to do so and one obvious step was to call in overdrafts and debit balances payable to free inhabitants. These measures, which approximated to liquidation of the branches, were unavoidable. The fact that the credits were released by instalments, as described by Mr. Leiper, was largely due to the fact that the Japanese in the occupied countries were faced with a very real currency problem. Leiper's evidence referred to Hong Kong; the exhibited documents shew that the same method was applied in Kuching; and it is within the knowledge of the Court, from evidence in previous cases, that similar instalments were paid in Malaya. Apart from these considerations, having regard to the length of the occupation, overdrafts to free inhabitants might well be lost, if not called in. It is not unreasonable to construe ' respect for property ' as covering organised preservation. Liquidation of these branches may therefore be justified on three grounds—first, respect, if construed as above, within the meaning of Article 46; secondly, orderly administration within the scope of Article 43; and thirdly, reciprocity; apart altogether from the Convention the Japanese were, in principle, treating these banks in the same way as the Malayan authorities had treated the Japanese banks under Restriction Orders. This is what they purported to do. Whether they did it well or ill, in relation to particular transactions, is another question but, in principle, they were justified.

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[1] (1951) M.L.J. 235.

" The defendants referred to the case of the *Bank of Ethiopia*[1] and argued that the liquidations were illegal because the Japanese occupation Government was not, and could not be, recognised as a *de facto* Government. This argument is misconceived. The distinction between *de facto* and *de jure* Government arises at later stages where international recognition is accorded to a change in sovereignty brought about by conquest or revolution. Belligerent occupation is neither *de jure* nor *de facto* Government in that sense; the expression '*de facto*' in the translation of Article 43 of the Hague Convention, to which counsel referred, is not used in that technical sense; it refers to the passing in fact of temporary authority into the hands of the occupant.

" Justifying the liquidation in principle, however, does not necessarily justify all that was done. The defendants believe that surpluses resulted and complain that these have not been paid to them. This raises the question of confiscation.

" There are really three quite separate questions of fact. Did the Japanese confiscate the defendants' funds in Hong Kong, Kuching or Penang? [The Judge examined the evidence and found that no confiscation in fact occurred in Hong Kong or Kuching.]

" As regard Penang, it may fairly be assumed that the defendant's branch was liquidated on the same general lines as other branches but there is no direct evidence of such liquidation. It cannot be assumed that the Y.S.B. were the liquidators. The argument rests on a different footing. It is said that the Y.S.B. received about $300,000 of the defendant's Penang cash, that they have not accounted for it, and that the plaintiff must either allow the defendants to set this amount off or account to them for it.

" The opening of the vault must, in my opinion, have been an official act of the Japanese Military Administration. It is unreasonable to suppose that the Y.S.B., as bankers, would do such a thing, as an activity of their new branch. I accept that the individuals who counted the cash were Y.S.B. men but not that they were then acting as servants of the Y.S.B. They did not then take away anything; they locked the vault up again and I infer that they reported the result of their inspection and awaited instructions. British Custodians employed people with banking experience in such matters and it was natural for the Japanese to do likewise. This search occurred several months after capitulation when the occupation Government was well established. I am satisfied that the men concerned were functioning as officers of the Japanese

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[1] [*Bank of Ethiopia* v. *National Bank of Egypt and Liguori*] [1937] Ch. 513 [see *Annual Digest*, 1935–1937, Case No. 38].

Custodian. When the new branch of the Y.S.B. was in operation the Custodian deposited these funds with them as his bankers. Later he segrated certain items and wrote a letter directing the transfer of $317,000 to a specific account. There the direct evidence ends. We know that on the collapse of the Japanese the country was re-occupied by British forces, without fighting, that a Military Administration was set up, with new "custodians", that in 1946 civil government was restored and orthodox custodians took over; the Penang branch of the Yokohama Specie Bank simply disappeared; it was not liquidated; the Japanese Custodian's records survived, at least in part, and were transferred to Kuala Lumpur at some date between 1945 and 1955. What happened can be stated, sufficiently for the present purpose, by anyone acquainted with the post-war legislation and the numerous cases decided under it, many of which are reported. Neither Counsel referred to this in so many words, but both conducted the case throughout on the basis that, in their general aspect, these matters were within the judicial knowledge of the Court."

Regulation of currency by Occupant.—" The Japanese invading forces arrived with supplies of currency notes, expressed in ' dollars ', and actually introduced these into circulation as they advanced southwards through the peninsula. The retreating British, as part of their military policy of denials, destroyed stocks of currency wherever they could. On capitulation there remained in the hands of the public and of financial institutions an amount of pre-war currency which was temporarily useful but insufficient for the needs of the population for an occuption lasting several years. Even if they had not been prepared for this situation the Japanese would have been compelled to instal an occupation currency. Their first step was to declare their notes to be legal tender, *pari passu* and at par with the residual pre-war Malayan notes. They adopted various measures to collect as much as they could of the Malayan issue, which rapidly disappeared from daily use, though a certain amount was hoarded by individuals and reappeared when the Japanese were on the verge of collapse. This was an illustration of the Ricardian doctrine that bad currency drives out good; it would have happened in any case, but Japanese policy accentuated the tendency. There was an unofficial or ' black ' market in which Malayan currency commanded a premium over ' banana ' currency —as the Japanese issue was termed, in allusion to a banana tree which was a conspicuous feature in the design of the notes. The banana currency was inconvertible; it was backed by nothing but the promise of the Japanese Government to pay—a promise which obviously would not be fulfilled at face value if they were defeated. It was a ' printing press currency ' which deteriorated progressively as the war went on; in 1945 it fell to a fantastic discount, like the German mark in 1923, and was finally made utterly valueless by an Order of the interim Government before new local currency was available.

" Prior to the war the Y.S.B. had no branch in Penang. During the occupation they opened one in the defendants' building and it functioned on the banana currency. When Penang was reoccupied the records survived but there was nothing to liquidate. The branch had not even a desk or a chair to call its own. The safes probably contained pre-war securities which belonged to the pre-war owners and were returned to them. The remaining stocks of notes were banana notes and valueless. No doubt the local customers had balances but they were all expressed in dollars which were really banana dollars. If an overdrawn customer were called upon to repay in September 1945, he could do so in banana dollars which were worthless to him. If a customer in credit drew a cheque for his balance it could be paid in banana dollars which were equally worthless. There was no point in doing anything. The branch was not merely insolvent, it was utterly without assets. It was from start to finish a paper branch and it was blown away by the wind of defeat in war.

" If the $300,000 in pre-war cash had still been in the vault the defendants could have claimed it and they would in fact have recovered it unless it had been looted during the confused period of the change over from Japanese to British Military Administration. The defendants have not adduced any evidence tending to show confiscation.

" What really occurred is not obscure. It is as nearly certain as anything of this kind can be that in accordance with *pari passu* policy of the Japanese occupation Government those notes and coins were absorbed, during 1942 and 1944, into general circulation and some of them were filtered into provate hoards. The Y.S.B. held that money as bankers for the Japanese Custodian who was, like British custodians, responsible to his own Government and in no circumstances to anyone else. The disappearance of the money is almost certainly due to the Japanese policy of treating two different currencies as though they were one and the same. Paying the money into a bank which afterwards failed is not equivalent to confiscation.

" The defendants incurred a war loss of about $300,000. Their real complaint is a political, not a legal, complaint. It would have been better for the defendants, and many others, if the United Nations had compelled the Japanese to pay a dividend on their ' banana ' obligations. Perhaps it was not practicable but, however that may be, they did not do so. Their failure to do so does not afford a ground of either set-off or counterclaim against the present plaintiff.

" The position of the Y.S.B. in Singapore is not, in any respect material to this action, different from the position in Penang. It is true that before the war they had a branch in Singapore, but they had no building of their own, merely a rented office. Shortly after the capitulation of Singapore they occupied the office of the Hong Kong Bank and resumed business in the limited way already described and mainly in ' banana ' currency. On the collapse of Japan their papers survived and passed into the control of the post-war Custodian. Pre-war documents and securities were returned to the former owners and occupation records eventually passed into the hands of the present plaintiff. They were available for reference and were in fact referred to for various purposes, but there was no liquidation for the best of reasons. Nothing susceptible of liquidation survived."

Claims of individuals under a peace treaty.—" On the question of confiscation the defendants cited the considered judgment of the Court of First Instance of Manila, delivered in 1946 in *Hong Kong Bank* v. *Saminillo*, Case No. 71009,[1] of which they produced a certified translation.

" Two inevitable difficulties attend the consideration of a foreign judgment; they arise from background and language. Many points in a case are affected by provisions of laws relating to evidence and to other topics which are not directly involved in the controversy and, being familiar to the Court, are taken for granted. A reader trained in another system knows that the analogous provisions of his own law may be different but he does not know what the actual differences are; he must be content to gather the main points; he cannot give full or precise effect to each individual passage. Legal and technical terms do not bear exactly the same connotation in different systems, even where the root word is identical. A literal rendering may mislead and a free translation cannot be precise. It is not to be expected that the translator will be a lawyer experienced in both systems. Subject to these general observations I think the present translation is a good one. [The learned Judge here discussed the case and held that it was distinguishable on the facts.]

" The defendants also referred to the Treaty of Peace with Japan, parts of which are set out in the First Schedule to the Order in Council. A treaty is an agreement between States and does not directly confer rights on individuals; no precedent for relying on the treaty itself was cited; I therefore doubted, and still doubt, its relevance but I allowed them to refer to it in this case because the Trading with the Enemy legislation expressly contemplates arrangements to be made at the conclusion of peace and it was just possible that some assistance might be derived. By Article 14, para. 2 (v) (b), the Allied Powers waived all claims of their nationals arising out of any actions taken by Japanese nationals in the course of the prosecution of the war. The defendants submitted that administration of occupied territory by a belligerent power, after all local fighting had ceased, is not part of the prosecution of a war; therefore, they said, the actions of the Y.S.B. in relation to the liquidation of the branches were not in prosecution of the war and accordingly the defendants' present claims are not waived by the treaty.

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[1] See *Annual Digest*, 1946, Case No. 157.

"On the point of construction I would say first that if it is necessary for the High Court to construe a treaty the Court will not demur, however unfamiliar to the individual Judge such a task may be; secondly, a treaty must be construed, as such, according to its whole tenor; the canons applicable to statutes are not safe guides. Subject to these observations I am of the opinion that the suggested distinction is unworkable. Lines of communication troops are no less engaged in prosecution of war than units in combat. Singapore was a base, at all times, and it was essential to the Japanese to make it secure during their operations in Burma. Their control of the whole peninsula was in fact, as in name, a Military Administration, sustained at all points by armed forces, and it was a strategic necessity. The language of the Article, in its plain and natural sense, includes actions of Japanese nationals in that administration. For instance, they ordered the felling of millions of rubber trees in Malaya. In one place this was to extend a purely military aerodrome; in another, for firewood to cook food for prisoners of war; in others to build and work factories, to make substitutes for petrol and motor oil from vegetable oils, for the use of the local inhabitants, mineral oils being scarce and reserved for Japanese purposes. If the various owners made claims, where is the line to be drawn between actions which were, and were not, in prosecution of the war?

"Even if the suggested line could be drawn the argument is a negative one. At best, it would mean only that the defendants' claim, as against the Y.S.B., is not expressly waived. What they want, the onus being on them, is a positive provision enabling them to enforce their claim against the plaintiff. Article 14, para. 2 (i), expressly provides that the Allied Powers shall retain such funds as the one here in question. Whatever view of the treaty may be taken, the Order-in-Council is legislation which can and must be enforced by the Court; sections 9 (3) and 14 provide in clear terms that such moneys shall be disposable by the Treasury and there is no provision saving such claims as are put forward by the defendants. If, contrary to my view, the Treaty and the Order-in-Council are relevant, they contain nothing expressly favourable to the defendants and are, by implication, adverse to their claim. . . .

"To sum up, my findings and conclusions are these.

"Early in December 1941 the defendants kept a special clearing account on behalf of the Y.S.B. It was understood that the account was to be kept separate from other accounts. On the outbreak of war with Japan the credit balance of that account became payable to the Custodian, without demand. The defendants are in default for not having paid it to him but that default was condoned by the Assistant Controller and the condonation continued until 30th June, 1946.

" In 1942 the Japanese Custodian in Penang recovered from the defendants' vault a quantity of Malayan cash of which $317,754 belonged to the defendants. That cash was paid by the Japanese Custodian into one of his accounts with the Penang branch of the Y.S.B. The actual cash passed into general circulation. The credit resulting from it is presumed to have been held in the books of the branch on behalf of the Japanese Custodian until the end of the war when the branch ceased to exist, without liquidation. The defendants have already recovered an unspecified part of their losses in Penang under the War Damage Scheme.

" The defendants' branch in Hong Kong was liquidated by the Japanese in lawful exercise of their authority as a belligerent occupying power. The Y.S.B. were nominally the liquidators, at least at the commencement, and were bankers to the actual liquidator during the main part of the liquidation. The defendants suffered losses but the evidence does not show how far these were due to the war, apart from the liquidation, how far they were due to the liquidation itself, or how far they were due to the failure of the Japanese currency. These losses were partially offset by the discharge during the liquidation of some of the defendants' liabilities and partially recouped from a pool of assets created in Hong Kong for the benefit of the defendants and similar banks. It is highly probable that the losses greatly exceeded the recoupment, but there is no evidence from which the Court can form even a rough estimate as to the amounts of the gross or of the net losses or of the recoupment.

" The defendants' branch in Kuching was liquidated in a generally similar manner but in 1944 the Y.S.B. handed over the liquidation in an unfinished state to another Japanese bank. There is no evidence from which either the gross or the net losses in Kuching can be estimated.

" There is no evidence to suggest that the Japanese ever confiscated any of the defendants' property.

" A banker is entitled to set off actual debts owing to him by a customer on one account against a credit balance on another account held for the same customer in the same right, whether at the same or at a different branch, provided that there was no express or implied understanding that the accounts should be kept separate; it is doubtful whether this applies to accounts kept in different countries or in different currencies.

" The functions of a Custodian of Enemy Property are purely statutory and he is accountable only to his own Government. He is not an agent or representative of a particular enemy and he does not ' stand in the shoes ' of an enemy for any purpose relevant to this action.

" The Custodian is not required to pay the ordinary creditors of an enemy concern and he is not allowed to pay them unless and until he is directed to do so by his Government. The Singapore branch of the Y.S.B. was and is subject to a Restriction Order which makes the branch a separate entity for the purposes of administration as enemy property and precludes the application of the assets to the payment of ordinary creditors and of claims arising abroad.

" For all these reasons I am of opinion that the claim of the plaintiff succeeds and that the set-off and counterclaim fail."

[Report: 1956 Singapore Law Reports 32.]

War—Effects of—On Private Enemy Property—Economic Blockade—Cancellation of Enemy Trade-Marks—Treaties Providing for Economic Blockade—Operation of—Conformity with National Constitution—The Law of Costa Rica.

COMPANIA FARBENFABRIKEN BAYER, S.A. *v.* STERLING PRODUCTS INTERNATIONAL, INC.

Costa Rica, Supreme Court (Extraordinary Session). October 11, 1956.

THE FACTS.—This was an application on behalf of the German Farbenfabriken Bayer Aktienegsellschaft for a declaration that Article 23 of the Law on Economic Blocade, enacted by Costa Rica on December 12, 1942, was unconstitutional. The Law on Economic Blockade provided in general for the taking of enemy property, with proper safeguards as to the proceeds of sale, etc., but in the matter of trade-marks and patents a different procedure was followed. Article 23 provided:

> " Registered trade-marks, commercial marks and patents of inventions, property of German, Italian and Japanese nationals, shall be cancelled in the appropriate Register. Any re-registration of these marks or patents shall be subject to payment of the fees and to the regulations provided by the Executive Power. The trade-marks and patents, property of German, Italian and Japanese nationals, not registered in Costa Rica and relating to agricultural or industrial machinery or implements shall be open for free exploitation until the end of the war. If any articles protected thereby contribute in a decisive manner to the agricultural or industrial development of the country, free exploitation shall—except so far as, in the opinion of the Secretariat of Finance, provisions of any treaty may provide to the contrary—be maintained, and registration of these marks and patents in Costa Rica may be effected by persons or enterprises collaborating directly in the industrial and agricultural development of this country."

Under this Article, the trade-marks of the applicant Company, which had been legally registered in accordance with the Costa Rican Law on Trade-marks, had been cancelled and Sterling Products International, Inc., a subsidiary of Sterling Drugs, Inc., of the United States, had in 1944 and 1945 registered the German trade-marks in their own name.

The applicant Company contended that trade-marks were personal or movable property, according to the Civil Code of Costa Rica, and that the person securing legal registration thereof was regarded as the legal owner; that ownership was therefore the attribute of proper registration. Cancellation of the registration would therefore result in deprivation of ownership of personal property. The Constitution of 1871, then in force, provided that this could be done only through expropriation procedure, when the property was taken in the public interest, and with prior compensation, assessed by experts. This constitutional protection must extend to registration of trade-marks and patents, since the registration itself constituted ownership of property; cancellation of a properly effected registration, as in this case, was a clear violation of the Constitution inasmuch as it was not done in the form of an expropriation decree. The applicant Company contended that this constituted confiscation of property because there was no public interest, no expropriating decree and no prior compensation. The Law of 1942, since it permitted in Article 23 the taking of private property, was therefore unconstitutional. Cancellation under that Law of trade-marks of enemy aliens deprived them of their property rights, while other persons or enterprises were permitted to re-register them as their own. Among these marks were those of the I. G. Farbenindustrie Aktiengesellschaft, which were cancelled in the Costa Rican Register, and Sterling Products International, Inc., of the United States, were able to expropriate them by registering the marks in their own name.

The Attorney-General of Costa Rica, intervening on the constitutional issues involved, based his contentions principally on the treaty obligations of Costa Rica towards the Allied nations, and continued: " . . . through the holding of a series of international conferences held uninterruptedly and periodically over the years, a true American international law has been formulated, which is also being adopted by Powers outside the western hemisphere and—with the collaboration of other free peoples of the world—is becoming one of the supreme standards for the life of the international community. As pertinent antecedents of this present case, we shall examine the following: In December 1936, the Inter-American Conference on the Maintenance of Peace was held in the city of Buenos Aires, and the following declaration was adopted: ' Any act menacing the peace of America affects each and every one of the nations, and will justify the initiation of consultations, as provided in the Convention, for the maintenance, preservation and re-establishment of peace, signed at this Conference.'

" Two years later, the International American Conference held at Lima adopted the so-called ' Declaration of Lima ', which incorporated the following principles of continental solidarity:

" ' The Governments of the American States declare . . . (3) in the event that the peace, security or territorial integrity of any one of the American Republics is . . . threatened by acts of any nature, they (the nations) proclaim their common and mutual interest and their determination to make their solidarity effective, co-ordinating their respective sovereign wills through the procedure of consultation as established in the Convention in force and in the declarations of the Inter-American Conference, availing themselves of any means which the circumstances may make advisable.'

" By virtue of the obligation which Costa Rica had undertaken, to fulfil the duties categorically undertaken under the above Conventions and especially that signed in Havana, we felt obliged, as were other American nations, to declare a state of war with the Axis Powers and to assume new and greater duties to help realize the triumph of the cause of the Allied countries, among whom we have had the honour of being always represented. We come at last to the signing of the Final Act of the Inter-American Conference on Systems of Economic and Financial Controls, held in Washington in June and July 1942, containing the following compulsory rule:

" ' (1) That in accordance with the constitutional procedure of each country, all necessary measures be adopted as soon as possible, in order to eliminate from the commercial, agricultural, industrial, and financial life of the American Republics, all influence of governments, nations, and persons within such nations who, through natural or juridical persons or by any other means are, in the opinion of the respective government, acting against the political and economic independence or security of such Republic, and that to this end the following measures be adopted: (a) The business, properties and rights of any real or juridical person included within the terms of the foregoing paragraph, whatever their nationality, shall be the object of forced transfer or total liquidation; and, if this should not be desirable in the opinion of the government of each country, they shall be the object of blocking, occupation or intervention in order to give effect to the purposes of this recommendation.'

" Applying and developing these general rules in our positive law, and adapting them to Costa Rican practice, our Government issued a series of laws, decrees, orders and resolutions which, in its opinion, were necessary to contribute to the defence of the integrity of America and among which we shall mention the following which constitute a sequence, proving their conformity with the material development of the great war. [He listed various decrees on the use of amateur broadcasting stations, the carrying of arms, the possession of explosives, and controls of various types over enemy alien residents] . . . Similarly, legal provisions were enacted in accordance with our obligations under the international Treaties and Conventions, most particularly those of Havana and Washington, mentioned above. Included was Decree No. 52 of December 26, 1941, prohibiting acts of commerce between Costa Rican residents—national or foreign—and persons residing in Japan, Germany and Italy—whatever their nationality might be; another Decree which compelled Japanese, German and Italian nationals to make a complete and detailed declaration of their property . . .; and finally, on this same basis, the Law known as the Economic Blockade Law, No. 26 of December 13, 1942, and Executive Decree No. 47 of January 27, 1943, both of special interest in this appeal. . . . The Economic Blockade Law and the Decree are based on Articles 2 and 109, Section 9, of the Political Constitution of 1871, with which they are identified, and in the light of the principles of which they should be examined, since within its sphere of action and study they are supported by precepts of the same value and binding force as other provisions of the Constitution. In other words, one cannot claim that the Law is contrary to the Constitution by reason of some apparent contradiction of general rules contained therein, as is the case here, when it is especially based thereon as a Law, giving the Law international and compulsory effect as between the contracting parties, as may be seen from the following principle: 'International Obligations—Source: Sources of international obligations may be contractual and non-contractual: the former emanate from treaties, the latter result from business dealings, delicts, torts and custom. In international law there is no legislation, but there are internal laws which produce international results; in addition, and by extension, the name "law" is given to obligations arising from other sources . . .' " (The Attorney-General here continued with excerpts from treaties and quotations from authorities on international law to prove the necessity of harmonizing municipal law with international obligations assumed under treaties, the right to confiscate property in war-time, etc.)

Held (unanimously): that the application must fail. There was no basis for declaring Article 23 of the Law on Economic Blockade of 1942 to be unconstitutional.

The Court said: " There was no conflict with Article 29 of the Constitution of 1871, dealing with expropriation, since the cancellation or nullification of the registration of the trade-marks was rather an act of Congress in the exercise of its full sovereignty in a public law having no relation to expropriation—an act of commercial defence against the economic activities of the Powers with which it was at war. The cancellation . . . did not imply expropriation, that is, it was not private property taken over by the State for its own use, in proof of which it is seen that later the Sterling Products

Company, in accordance with the Law of 1942, registered the trademarks which were then ' vacant ', that is, they did not belong to the State.

" . . . By Decrees No. 3 and 4 of December 8 and 11, 1941, the Executive Power declared a state of war between Costa Rica and the Japanese Empire, Germany and Italy. The third recital of Decree No. 3 states:

> ' In accordance with such policy, it was declared at the Inter-American Conferences recently held in Buenos Aires, Lima, Panama and Havana, with the Costa Rican representatives voting, that any act menacing the peace of America will affect each and every one of the nations on the Continent, and that they re-affirm their declaration to maintain and defend, against any foreign intervention or activity which may threaten the sovereignty of any one of them as well as the principles of hemispheric solidarity; that they proclaim their common interest and their determination to make effective such solidarity in the event that the peace, security or territorial integrity of any one of the American Republics shall be menaced by acts tending to injure the same . . .'

In the recital of Executive Decree No. 4 it is stated:

> ' . . . the international policy of the Republic of Costa Rica, in accordance with that established by the Conventions of Buenos Aires, Lima, Panama and Havana, is one of complete solidarity and co-operation with the sister Republics of this hemisphere, when they are threatened by a non-American Power, and therefore it must be considered our national duty to join with the United States of America in the present emergency.'

" . . . Therefore, Article 23 of the Economic Blockade Law now challenged as invalid, decreeing the cancellation of certain trademark and patent registrations owned by enemy aliens at war with Costa Rica, was legally effective in accordance with Article 12 of the Constitution, because it deals with a problem of public legislation which establishes restrictions on the exercise of commerce and trade by enemy aliens, by virtue of international treaties entered into on behalf of inter-American defence; and it is in harmony with constitutional principles relating to that class of persons. It is not possible, therefore, to state that Article 23 conflicts with Article 29 of the Constitution of 1871 (now Article 45 of the present Constitution), because even though such provision does refer to the inviolability of private property, the fact is that Article 12 cited above established restrictions on alien property in accordance with law and international treaties. . . . The Executive Power was . . . empowered to sign public treaties and agreements and to execute them after approval and ratification by the Legislative Power (Article 109, Section 9, of the Constitution of 1871, now Article 140, Section 10, of the Constitution in force). Therefore, the national honour having been committed by virtue of said Conventions, based on the Constitution itself, we find that Article 23 of Law No. 26 on Economic Blockade, of December 12, 1942, was justified; even more so if it is considered that the law relating to aliens, in accordance with the Constitution of 1871, while granting them the rights, mentioned in Article 12, to 'acquire, possess and alienate real property, navigate rivers and coastal waters, and exercise their industries and trades', yet has subjected these rights 'to the limitations fixed by law and international treaties'."

[Report: *Boletin Judicial*, December 7, 1956, p. 1661.]

vi.—On Neutral Persons and Property. The Right of Angary

War—Effects of Outbreak of—Neutral Persons and Property—Requisition of Ship—Compensation for—Vessel Belonging to Nationalized Shipping Company—Valuation as Affected by Dispute as to Title—Whether Title Acquired through Nationalization.

ESTONIAN STATE CARGO AND PASSENGER STEAMSHIP LINE *ET AL.* *v.* UNITED STATES.

United States, Court of Claims. April 3, 1956.

THE FACTS.—This was an action to determine just compensation for the *Maret*, a vessel owned by the intervening plaintiffs, an Estonian shipping company, which had been requisitioned by the United States in 1941. In *Estonian State Cargo and Passenger Steamship Line et Al.* v. *United States*, 126 Ct.Cl. 809, 116 F.Supp. 447 (1953),[1] the Court of Claims had held that the original plaintiff in the case, which had been "nationalized" by the Presidium of the Provisional Supreme Soviet of the Estonian Soviet Socialist Republic, had no title to the vessel at the time it was requisitioned. The Court had held that the United States had not recognized the incorporation of Estonia into the U.S.S.R., that the United States did not recognize the validity of decrees resulting from this annexation, and that the decree of nationalization would not in any event be given application to the *Maret*, which was outside Estonia at the time of the purported nationalization.

In the present action, the United States had conceded that the intervening plaintiffs were entitled to "just compensation". The expert witnesses for the intervenors estimated the value of the *Maret* at a figure which was reduced to approximately $176,000 when the cost of making the vessel sound and seaworthy was taken into account. The corresponding average of the valuations of experts for the United States was approximately $90,000. One of the matters in issue was whether, in view of the cloud on title, compensation should be fixed on the basis of the market value of the vessel or on that of its value to the United States.

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[1] Noted in *International Law Reports*, 1953, p. 195; *see also The Maret* (*Annual Digest*, 1943–1945, Case No. 9, at p. 39).

Held: that the sum of $100,000 represented the proper value of the vessel, the figure being one fixed at a point between the value of the vessel to the defendant and its fair market value. While fair market value was normally the proper compensation to be paid for a requisitioned vessel, its value in this case was seriously impaired by the cloud on title. On the other hand, the Government could not be permitted to acquire a vessel cheaply by waiting until the owners were at a disadvantage as the result of a dispute concerning the validity of the purported nationalization of the ship.

After dealing with the valuations placed on the vessel by the experts and the cost of putting the ship in seaworthy condition, the Court said: " These valuations do not take into account the fact that the title to the vessel was in dispute at the time it was requisitioned. The Soviet Government, on the one hand, was claiming title, and the former Estonian owners, on the other hand, were claiming title. Litigation over the vessel began in August 1940, while the vessel was in the harbor of St. Thomas, Virgin Islands. It continued in the District Court of the United States until November 17, 1941, when a motion was made to stay further proceedings indefinitely. Thereafter, on August 22, 1947, the Estonian State Cargo and Passenger Steamship Line, which had been nationalized by the Soviet Republic, filed a petition in this court claiming title to the vessel, and on March 4, 1948, the former Estonian owners filed a motion to intervene, which was allowed, and intervenors' petition was filed April 16, 1948. Title to the vessel was not adjudged until our opinion of December 1, 1953, 116 F.Supp. 447, 126 Ct.Cl. 809.

" This dispute over the title to the vessel of course affected its market value. As one witness expressed it, only a gambler would buy the ship. All of the witnesses who were interrogated on this subject admitted, of course, this dispute over title would seriously affect its market value. Ordinarily, just compensation is what the owner could get for his property on a free market. On account of the claim of the Soviet Republic, it is doubtful that intervenors could have sold the vessel at all. But, on the other hand, this dispute over title did not particularly concern the defendant. Under its power of eminent domain it could take the vessel and keep it and pay no one until the rightful owner had been determined. The dispute over the title did not affect the value of the vessel to the defendant.

" The dispute over the title greatly minimized the value to the intervenors, if they had been required to sell it before the cloud on their title had been removed. It seems unjust that their recovery should be limited to what they could have gotten for the vessel before the cloud had been removed. The defendant is not entitled to choose a time for the taking which puts the owners to a disadvantage, and then take advantage of the owner's misfortune in fixing just compensation. Somewhere between what the vessel was worth to the defendant and what the owners could have gotten for it lies just compensation. According to defendant's experts, it was worth to the defendant about $90,000; according to intervenors' experts, about $176,000. We shall assume it was worth $150,000 to defendant. In view of the dispute as to title we think $100,000 is just compensation to the owners.

" To this is to be added the agreed value of the consumable stores on board, amounting to $7,707.21, and from the sum is to be subtracted the amount the defendant spent to discharge liens, amounting to $20,842. This leaves the amount of $86,865.21.

" In view of the conflict over title, we think the defendant is excused for not having made payment heretofore or until after the time for filing petition for writ of certiorari expires; therefore, intervenors are not entitled to have included in just compensation any sum for delay in payment."

[Reports: 134 Ct.Cl. 813, 139 F.Supp. 762; *certiorari* denied, 352 U.S. 928, 1 L.Ed 2d 163, 77 Sup. Ct. 228 (1956).]

Angary—Whether Exercisable by Neutral State—Judicial Basis of Right of Angary—Territorial Sovereignty, State Necessity and Eminent Domain—Compensation Following upon Exercise of Right of Angary—Whether Limited to Amount of Damage—Loss of Profits—Monetary Interest—Compensation for Value of Fuel, Provisions and Spare Stores—Currency of Payment of Compensation—Sources of International Law—Customary International Law.

LAURITZEN *ET AL. v.* GOVERNMENT OF CHILE.

Chile, Supreme Court. December 19, 1955.

THE FACTS.—The shipping company of J. Lauritzen and two other Danish firms, Aktieselskab Dampskibsselskabet Vesterhavet and Rederiet Ocean Aktieselskab, which it owned, brought an action for damages in respect of five ships, the property of these companies, which had been requisitioned by the Government of Chile under the right of angary. The ships, of Danish registry, had arrived in the Port of Talcahuano in June and July 1940. On February 15, 1941, the Government requisitioned three of the ships; and on May 8, 1941, two more ships were requisitioned. The five ships were then chartered to the Compañía Sud-Americana de Vapores, the only Chilean company engaged in North Atlantic shipping. Three of the ships were lost between 1942 and 1944, and the two remaining ships were returned to the owners on February 1, 1946, together with fuel, stores, and extra supplies thereon. Decrees No. 310 of February 15, 1941, and No. 319 of May 8, 1941, ordering the requisitions, provided that compensation would be paid for the use of the ships together with maintenance in Chile of masters, officers, and crew who did not continue to serve thereon. In determining the amount of compensation reference was to be made to Resolution XIX of the Inter-American Financial and Economic Advisory Commission, dated April 26, 1941.

On July 12, 1946, the Government paid the Company the sum of $1,818,842.61 (U.S.), representing the amount of insurance realized on the vessels which had been lost together with the net profits received for use of the other vessels. The Company rejected this sum and asked for full indemnity to cover the value of the ships lost, compensation for the use of the five ships, the value of fuel, stores, and additional supplies not included in the value of the ships, *lucrum cessans* for the three ships lost, and the expenditure by the owners in salaries and expenses of the officers and crews of the five ships. The Government of Denmark supported the Company's view that the requisitions constituted angary and violated international law because at the time of the requisitions neither State was a belligerent. It should be noted, however, that at that time Denmark was occupied by German troops and that Danish ships could not sail from Chile on account of a warning by Great Britain to the effect that they would be treated as having enemy status. The Company maintained that requisition under angary required the payment of full indemnity in accordance with the principles of international law; that the claim must be adjudicated with reference to international law and not to the municipal law of Chile; and that the claim fell within the original jurisdiction of the Supreme Court under Article 53 of the Judicial Code. The Government of Chile contended that requisition for use did not constitute angary, which could only be practised by belligerents while in the present case both States were neutral at the time of the measures in question; that the principles governing payment of indemnity under angary were not applicable; that the ships were not taken for war use but as a sovereign act for economic and commercial purposes intended to benefit the general welfare; that the exercise of sovereignty was supported by the above-mentioned Resolution XIX; that payment for use was appropriate, but not an indemnity; and that as the case concerned an issue of municipal law it was properly adjudicated in the lower Courts.

On appeal,

Held: that the right of angary could be invoked by one neutral against ships of another neutral. However, the exercise of the right of angary required payment of compensation for the use of the requisitioned vessels, for the value of ships lost and for *lucrum cessans* of ships lost, together with interest. No compensation need be paid for the value of fuel, supplies, and extra stores, nor for salaries and expenses of officers and crews.

The Court discussed the municipal law of evidence and civil procedure and pointed out that the case came within the original jurisdiction of the Supreme Court. After reviewing the facts of the case, the Court said: " This action must be adjudicated in accordance with the principles of international law, as the trial Court pointed out (*Record*, pp. 52, 98, 123). As is well known, international law does not consist [only] of written laws whose observance is obligatory for the whole international community. It has other sources, which have been defined by doctrine. Thus custom and treaties figure among the traditional sources, to which may be added principles established by international jurisprudence, especially that of the International Court of Justice, as well as principles contained in municipal law. . . . Thus Article 38 of the Statute of the International Court of Justice, the juridical organ of the United Nations —whose Charter was signed on June 26, 1945, and ratified by our Government on September 18 of that year—provides as follows. [The Court here cited Article 38 and continued:]

" Given the nature of the principles of international law, it is necessary to bear in mind that our municipal law must also frequently apply these principles. Thus, for example, Article 1 of the Code of Penal Procedure provides for the adjudication of certain cases according to principles of international law; Articles 647, No. 2, and 651, provide for extradition in accordance with the provisions of treaties in force, or in the absence of a treaty in accordance with the principles of international law.

" ' Publicists unanimously attribute primary importance to *custom*, understanding by that term ', as Martens says, ' the rules which are established on the basis of constant practice in the same circumstances.'[1] This view is supported by the Italian professor, Julio Diena:

> ' Custom has the greatest importance as a source of international law, in view of the fact that this branch of law has not been the subject of general codification. Custom is created when two or more States adopt the same approach to the regulation of a given situation. In similar or analogous circumstances these States and other States continue to conduct themselves in this manner. If the norm of conduct thus adopted is repeated and agreed upon by a sufficiently extensive number of States, with the conviction of having an obligation to so act, custom acquires the character of a true and genuine norm of positive international law. For this purpose it is necessary, however, to have the concurrence of the voluntary agreement of various States; if only one State voluntarily but unilaterally repeats the same act frequently, this would not constitute an international custom.'[2]

" In short, custom, on which the greater part of international law is based, is founded on the tacit consent of nations. In order to ascertain whether a rule of international custom exists, it is necessary, as González Hontoria has observed, to find the concurrence of practice and consent. The existence of a customary rule will be determined not only by the practice of public authorities but also by the approval of third States and of public opinion, especially that of jurisconsults.[1]

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[1] F. de Martens, *Tratado de Derecho Internacional* (Trans. by Prida), vol. I, p. 238.

[2] Diena, *Tratado de Derecho Internacional* (Spanish trans.), 3rd ed. (1932), p. 14.

" In regard to custom, it must also be remembered that the collective will of States can not only give rise to it but can also modify or abrogate it. Actually, international custom, like all forms of custom, is neither definitive nor immutable. Emerging from societal existence, it is continually subject to renewal and to change in accordance with current needs. The conviction of necessity creates custom, a concept which has long been known as the *opinio necessitatis*. As Bynkershoek puts it, in a statement which has become an aphorism of international law: *ut mores gentium mutantur sic et mutantur jus gentium*.

" A change in a norm, as the Chilean publicist Alejandro Alvarez has pointed out with reference to changes in customary rules, may arise from its violation by a State, when the custom does not conform to new needs.

" 'Custom is not immutable. It may evolve or disappear, and at times it is difficult to recognize whether it has evolved or disappeared. A custom must terminate whenever the circumstances which gave rise to it have so changed in form that the customary rule can no longer be followed. Conscience and good sense indicate to States that they need not follow it, in the absence of a legislative organ empowered to abrogate it, and given the difficulty of determining its abrogation by general or conventional agreement.

" ' In order to change custom or to abrogate it, a State must take the initiative and more or less openly refuse to recognize the norm; a proceeding which is fraught with difficulty if it is not handled tactfully. Such an act may provoke vigorous protest; but the State may justify its action readily by showing that it was brought about by a new necessity and not by subjective considerations alone. This procedure may serve as a precedent or as a point of departure in order to justify a change in the rule. A new precedent, well established, often has more validity than an old custom which is generally considered to have fallen into desuetude.'[2]

" It is precisely the evolution of international custom in regard to the right of angary, as will be shown later, which compels this Court to consider the issue before it from a different point of view from that on which was based the judgment under appeal. As this case is being adjudicated in accordance with the principles of international law, it is necessary to consider the principles relating to angary.

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[1] Hontoria, *Tratado de Derecho Internacional Público*, vol. I (1928), p. 22.

[2] Alvarez, *La Codification du Droit International*, pp. 143–144, cited in his study entitled *La Grande Guerre Européenne et la Neutralité du Chili* (1915), p. 45, n. 1. See also Westlake, *Etudes sur les Principes du Droit International* (trans. by Nys, 1895), pp. 85–86; Cavaglieri, *La Concetudine Giurídica Internazionale* (1907); Oppenheim, *Zur Lehre vom Internationalem Gewonheitsrechts* in *Niemeyers Zeitschrift*, 1915, pp. 1–13; Balladore Pallieri, " La Forze Obligatoria della Concetudine Internazionale ", in *Rivista di Diritto Internazionale*, 1928, p. 338 ff.

" *Bases of the Claim. Right of Angary.*—The action for damages arises from the requisition of five Danish merchant ships, property of the plaintiff, made by the Government of Chile in pursuance of two decrees. The text of the Decree of February 15, 1941, [No. 310] reads as follows:

> " ' Whereas lack of tonnage has considerably reduced the international maritime trade of this country with a consequent disturbance of the entire national economy;
>
> ' Whereas this situation is an immediate and direct consequence of the present war in Europe in regard to which Chile is a neutral;
>
> ' Whereas the tonnage of the National Merchant Marine, and that furnished by other neutral nations, does not suffice to meet the immediate need;
>
> ' Whereas given the impossibility of determining the duration of the said war, it is the duty of the Government to prevent an interruption in commerce indispensable to the national welfare;
>
> ' Whereas the only way to meet this urgent public emergency is to make use of the idle tonnage of the foreign merchant ships which for some months have been anchored in the ports of the Republic;
>
> ' Whereas the Government adopts this method in order to benefit the Republic and to carry on trade with other neutral nations;
>
> ' Whereas resort to this urgent and temporary action is in no way prejudicial to the rights of the legal owners of said ships, nor places any obligation on the personnel of said ships, *for the Government of Chile proposes to indemnify at the appropriate time each of the owners, outfitters, or legal representatives for such use and to provide for the maintenance of the said personnel*, assuring them while they remain in Chile the treatment accorded to the subjects of friendly States residing in neutral territory; Decrees:
>
> ' 1. The following Danish merchant ships now located in the Port of Talcahuano are declared to be in public service for the duration of the present European war: *Lotta*, *Frida*, and *Helga*.
>
> ' 2. The said ships shall be placed under the control of our merchant marine from this date forward and shall sail under the national flag;
>
> ' 3. Each of the said ships shall be immediately inventoried and appraised by a special technical commission to be appointed by the Minister of Foreign Relations and Commerce who is charged with the execution of this decree;
>
> ' 4. The officers and foreign crew members serving on the said ships will be disembarked and while remaining in Chile they will receive monthly compensation for the expenses of maintenance in proportion to their professional status. Officers and crew members who desire, however, to continue to serve on the said ships will be allowed to do so, and their remuneration will be arranged by the parties.' "

" The second decree, dated May 8, 1941, provides as follows:

" ' Considering the provisions of Decrees No. 310 of February 15 of the present year, and No. 371 of the 28th of the same month and year, and considering the resolution adopted by the Inter-American Financial and Economic Commission in Washington on April 26 past, which has been approved by this government; Decrees:

' 1. That the Danish merchant ships *Selma* and *Laila* which have taken refuge in the Port of Talcahuano are public property for the duration of the present European war;

' 2. The said ships shall be placed under the control of our Merchant Marine from this date forward and shall sail under the national flag;

' 3. Each of the said ships shall be immediately inventoried and appraised by the Special Technical Commission created by Supreme Decree No. 371 of February 28, 1941;

' 4. The provisions of Decree No. 371 of February 28 of the present year will be applied to the ships *Selma* and *Laila*, and article 1 of this Decree will be modified as follows:

' The Danish ships, *Frida*, *Lotta*, *Helga*, *Selma*, and *Laila*, now anchored in the Port of Talcahuano, shall be placed at the disposal of the National Navy, in order that they may be used in international maritime traffic or in cabotage, directly or under the control of Chilean shipping firms.

' In either case, the use of the ships for commercial purposes will be subject to supervision of the Ministry of Foreign Relations and Commerce in accordance with the regulations which it may establish.

' 5. The officers and foreign crew members serving on the said ships will be disembarked and while remaining in Chile, they will receive monthly compensation for the expenses of maintenance in proportion to their professional status. Officers and crew members who desire, however, to continue to serve on the said ships, will be allowed to do so, and their remuneration will be arranged by the parties.' "

" The defendant argues that the principles of international law require that the national treasury [Fisco] indemnify the owners of the requisitioned ships in accordance with the terms of the said decrees. The plaintiff replies that requisition for temporary use of the five Danish ships is admissible under the international law principle of ' angary ', ' right of angary ', or *jus angariae*, and that the exercise of this right obligates the requisitioning State to make full indemnity, by which is understood the payment of just compensation for use of the ships together with reparation for any other loss [*perjuicio*] without deductions, restrictions, or limitations.

" The plaintiff rejects the plea of right of angary in this case, maintaining, in short, that this right may only be exercised by belligerent States and that as a matter of fact neither Chile nor Denmark was, in 1941, a belligerent State. It may be added that the Government of Denmark maintains that the requisition was an unlawful act on the part of a neutral country and that right of angary cannot be pleaded.

" The trial Court, rejecting this argument, took the position that ' there is no established jurisprudence on which to base the plea that neutrals may not make use of the right of angary which has always been the right of belligerents as a necessary act in wartime.' (Conclusion No. 18). Therefore, it is necessary, in order to adjudicate the matter of indemnity, to inquire whether the so-called ' right of angary ' may be invoked between neutral States, which was the status of Chile and Denmark at the time of the requisition.

" The right of angary, which in general terms is simply the requisition of foreign merchant ships in conditions of imperative necessity, especially in wartime, has been a very controversial concept during the course of its evolution as a juridical institution in international law. Publicists have never fully agreed on the justification, extent, or nature of the practice, and have only contributed to its uncertainty, as Rolin has observed.[1] The term ' angary ', etymologically considered, is of Persian origin according to some writers. It has its origin in what Herodotus and Xenophon called *angareion*, a form of postal service organized in Persia by Cyrus, for the purpose of sending orders to distant parts of his empire. The posthouses were called ' *angaras* '. The mounted messengers and equipment were requisitioned.[2] The Greeks[3] and the Romans[4] also had this institution.

" The historical antecedents of the right of angary, in the first stage of its development, show that it had the character of a public service, consisting of placing horses and vehicles at the disposal of the State for official purposes. Instances of the requisition of ships do not appear before the sixteenth century. Le Clère cites examples of the first requisition of foreign ships as taking place in Antwerp in 1539 and 1587. After showing that angary was abused in the seventeenth and eighteenth centuries, above all in regard to detaining on board the crews of the ships, he cites the case which occurred in France in 1798 when the Directory requisitioned (by angary) numerous ships to carry Bonaparte's troops to Egypt. He also calls attention to Bonaparte's Decree of September 13, 1798, issued at his General Headquarters at Cairo, which provided for compensation in advance of the institution of claims by the public or private interests adversely affected by the requisition.

" This is the first explicit text ordering payment of complete compensation to the owners of requisitioned ships.[1] Publicists also cite the case of the Prussian troops who seized sixteen British ships in Duclair during the Franco-Prussian War in 1870, for the purpose of barricading the Seine so that French ships could not use the river.[2]

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[1] " Beaucoup de discussions vaines au sujet d'une institution juridique ne se prolongent souvent que parce que l'on n'est pas d'accord sur ce qu'elle implique, et c'est l'incertitude de la terminologie que en est la cause." (Rolin, " Le Droit d'angarie ", in *Revue de Droit International et de Législation comparée*, No. 1, 1920, p. 22.)

[2] See Rolin, *loc. cit.*, pp. 19 ff.

[3] See Massé, *Le Droit Commercial dans ses rapports avec le Droit des Gens*, vol. I, No. 328.

[4] See Harley, " The Law of Angary ", in *The American Journal of International Law*, vol. 13, No. 2, April 1919, p. 267, and Cruchaga Tocornal, *Nociones de Derecho Internacional*, 3rd ed., vol. II (1925), p. 197, No. 977.

" Aside from these cases of angary and some other isolated instances, there are few examples in the maritime history of this period. Nevertheless, justification of recourse to angary has been debated in conferences, and doctrine, as far as it exists, is not favourable to this institution. In general, it is regarded as a violation of neutrality.

" Neither the Hague Convention [No. V] nor the Declaration of London [of 1909] dealt with angary in regard to neutral ships. The Institute of International Law, however, took up this problem at its second session at The Hague in 1898.[3] In Article 39 of the Rules approved by this Institute after lively debate appears the following statement: ' Right of angary with regard to neutral vessels is abolished in time of peace and in time of war.' Later, however, in 1906, the same Institute, at its session at Ghent, rescinded this Article, which would suggest that the opinion of the Institute had changed.

" Article 19 of Hague Convention No. V of 1907 provides clearly for right of requisition and use by a belligerent of neutral railway material and vice versa. It reads:

> " ' Railway material coming from the territory of neutral powers, whether it be the property of the said powers or of companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin. A neutral power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of the belligerent power. Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage.'

" Since the eighteenth century numerous treaties have explicitly dealt with the right of angary, either by renouncing it or by admitting it subject to the express condition of paying appropriate compensation.[4] Thus, for example, the United States, shortly after declaring its independence, rejected [the] right of angary in its treaties with Denmark, Russia, Prussia, and France; but in its Treaty with Peru of 1870 the requirement of compensation is mentioned. The Treaty of 1818 between Germany and Denmark provides: ' No ship belonging to either contracting party may be forced into wartime or other service.' The Treaty of 1868 between Germany and Spain contains the following clause:

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[1] See Le Clère, *Les mesures coercitives sur les navires de commerce étrangers* (1949), pp. 39–40.

[2] *Ibid.*, p. 43.

[3] See *Revue Générale*, 1898, p. 857.

[4] See Cruchaga Tocornal, *op. cit.*, p. 198.

> 'The subjects of each contracting party when in the territory of the other party are exempted from personal service in the army, navy, or national militia, and likewise from war taxes, forced loans, and military requisitions. Their property may not be sequestrated; their ships, cargos, merchandise, and effects may not be taken for any public purpose without prior provision for compensation, arranged between both parties, on just and equitable terms.'

Similar provisions are to be found in treaties concluded by Germany with Mexico (1882), Colombia (1892), Guatemala (1887), Nicaragua (1896), and Costa Rica (1875).

"'Germany [says Cruchaga] sought thus to guarantee against the *jus angariae* by which certain countries might try to eke out their limited national tonnage by taking advantage of the fact that a greater number of German ships would be in their ports than ships of their flags, in German roadsteads; hence, its exercise was admitted only in connection with an equitable indemnity.'

France made analogous Treaties with Chile in 1852, with Peru in 1861, etc., containing the condition of prior provision for indemnity.

"The Treaty between the United States and Prussia (July 11, 1799) provided that angary might be exercised in case of urgent necessity, provided that full indemnity was paid. Similarly, the Treaty between Portugal and Germany (November 30, 1908) deals with the exercise of angary (Article 2). The practice was also recognized in the Treaty between Brazil and the United States of December 12, 1828. Article 7 provides:

> 'The subjects or citizens of each of the contracting parties may not be subjected to any embargo, nor be detained with their ships, cargoes, merchandise, or effects, for any military purpose, nor for public or private purposes of any kind without payment of sufficient indemnity to the persons affected.'

"This recognition of the right of angary in treaties, to which reference has been made, has also been reflected in municipal law. For example, the German Law of June 13, 1873, refers to such requisitions; the Naval Code of the United States of 1900, in Article 6, provides that neutral ships found within the jurisdiction of a belligerent may be seized and destroyed or utilized for military purposes, provided that the owners are indemnified in each case.[1] The Peruvian Law No. 2996, promulgated by the President of the Republic on January 30, 1918, authorizes the Executive 'to take possession of foreign vessels and their equipment when circumstances require, for essential public service in the general welfare, provided that the owners be indemnified.'[2]

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[1] See Hackworth, *Digest of International Law*, vol. VI (1943), p. 638.

[2] *Ibid.*, vol. VII, p. 534.

"Although the Brazilian Law No. 4263 of January 14, 1921, concerning military requisitions, does not specifically refer to the right of angary, it does provide in Article 1 that:

> 'Requisitions of every kind are permitted if indispensable to the provisioning and transporting of military or naval armed forces, whether mobilized completely or partially, by virtue of a state of war or as a consequence of an internal uprising and state of seige.'

Among the items subject to requisition, according to Article 9 (4), are: 'methods of transportation of various kinds, including seagoing and river ships, railroads, and airplanes, together with their personnel and equipment.' Article 15 (1) provides: seagoing vessels subject to requisition include those belonging to Brazilian companies or nationals as well as those which are the property of foreign companies and nationals belonging to States whose municipal law provides for the same action in like circumstances.' This law provides for the payment of compensation for such requisitions.

"It is interesting, moreover, in pursuance of this study to note the various alternatives to right of angary which have appeared in the writings of publicists in the course of its development. Hautefeuille, an enthusiastic defender of the rights of neutrals, attacked the concept of right of angary. He defined it as follows:

> 'It is the method by which the authority in control of a port requisitions all foreign ships therein to use them and their crews, in the interests of the state, though such action may violate the wishes of the owners and masters. [He adds:] Angary takes place in war time and for war purposes such as the transportation of troops, munitions, arms and supplies.'

After defining angary in these terms, this distinguished publicist attacks the practice:

> "'. . . Angary is one of the most excessive rights attributed to belligerents. Can it be admitted, in effect, that a sovereign State simply by being at war may force a neutral foreign ship to abandon its commercial operations in order to enter belligerent service, thus losing its neutral character and exposing it to the risks of war, and all for an indemnity fixed by the same belligerent according to its interests and often not paid? This is a serious attack on freedom of commerce and the independence of States.'[1]

"It should be noted that the objections to angary arise from neutrals as passive subjects of law. With regard to enemy belligerents, there is no controversy because their situation is covered by the international law of prize. Angary is not the same as belligerent capture. The requisition of national vessels, it may be noted, is a matter of municipal law. Hautefeuille does not discuss whether right of angary belongs only to belligerents, a matter which seems to be tacitly admitted because angary is undertaken in wartime, *i.e.*, when one is dealing with belligerents.

[1] Hautefeuille, *Histoire des Origines, des Progrès et des Variations du Droit Maritime International*, 10th ed. (1869), pp. 229–230.

" Other writers also treat this subject. Paul Fauchille equates right of angary with requisition [expropriation], arguing that the practice

> ' may be justified by the necessities of war, that is, by the right of eminent domain of the belligerent State, over objects found within the territory under its sovereignty. Requisition of ships is what is called in international law right of angary (*jus angariae*). But it should be noted that in reality, the right of angary may be exercised over all movable things found in the territory of a belligerent or in enemy territory which it is occupying. Right of angary was extended by Articles 54 and 19 of Hague Conventions of 1899 [II] and 1917 [*sic*: 1907] to requisition of railroads.'

After insisting that angary is a form of requisition, he continues:

> ' One may wish, however, to distinguish the terms by saying that requisition is effected in enemy territory, while angary takes place in the territory of the belligerent who has recourse to this procedure. This is not exact: requisition may take place outside enemy territory. What is correct is the fact that angary is a form of requisition and applies to things which are not associated permanently with a territory but which are temporarily therein.'[1]

" Harley, after studying and defining right of angary, following Halleck, Lawrence, Dana, Wilson, Hall, Kleen, and Ferguson, ends by stating it in these terms:

> ' . . . It is the right which a State has in time of war or public danger, to requisition for its own use, or to destroy, vessels belonging to other states which are found within its jurisdiction. It may be only exercised in case of grave public necessity and the owners of the vessels must be fully compensated for the use thereof, reasonable provision being made for the crews.'[2]

" Bullock, however, modifies this definition to some extent, saying:

> ' Right of angary is the right which a State has to requisition in time of war or public danger and for its own use, ships, airplanes, rolling stock, and other means of transportation belonging to the nationals of other states, located within its jurisdiction at the time of requisition. The right does not extend to personal services of crewmen, etc., if they are foreign nationals, and their protection must be assured. Such requisition may ne exercised only at a time of grave public danger and the owners must be fully compensated for the use of their property.'[3]

A. Pearce Higgins and John Colombos take a similar position.[4]

" As can be seen, Bullock's definition, which Higgins and Colombos accept, is broad enough to justify angary not only in time of war but also in time of public danger, *i.e.*, time of peace. Perhaps the only point at issue is that relative to the extent of the right, inasmuch as it does not appear acceptable that angary comprehend means of transport other than ships or airplanes, both of which are subject to the régime of double sovereignty and are most commonly affected by right of angary. Rolin, attempting to define the practice in general terms, says that ' angary is only the seizure by a belligerent of personal property of neutral or enemy ownership for use in the struggle against the adversary.'[1]

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[1] Fauchille, *Traité de Droit International Public*, 8th ed., vol. II (1921), p. 788.

[2] *Loc. cit.*, p. 282.

[3] Bullock, " Angary ", in *British Year Book of International Law*, 1922–23, pp. 92, 129.

[4] Higgins and Colombos, *The International Law of the Sea* (1945), pp. 389–617.

" Harley[2] makes an interesting statistical study of opinions of publicists regarding the right of angary. They may be divided into four groups:

> " ' (a) Those who admit the legality of angary in cases of necessity but with the obligation to pay an indemnity. These are described as " favorable ". (b) Those who admit right of angary but with reservations as to its legality and the conditions of its exercise. This class is described as " favorable with reservations ". (c) Those who deny the legality of angary. These are called " unfavorable ". (d) In the fourth group are included those who mention the right in passing or limit themselves to citing opinions of other publicists '.

According to this investigation, the author produced statistics based on an examination of the views of 79 authorities in this field [omitted]

" Although the simple process of listing opinions is not sufficient to demonstrate the validity of a doctrine, certainly this statistical study indicates at least that a great majority of publicists are inclined to accept the legality of angary. As Le Clère has observed, after stating that ' recourse to statistics in this matter is a curious idea: . . . Nonetheless this table shows that the great majority are favourable to the legality of angary.'[3]

" The experience of the past two World Wars has led authors to a change in view, to inaugurate a new phase of the right of angary. In effect, they have begun to accept its exercise not only by belligerents but also by neutrals. In regard to this view, the Brazilian Professor Hildebrando Accioly, after quoting Rolin, states:

> ' The modern concept confirmed by relatively recent practice, makes of angary not only a right of belligerents in regard to property of enemies or neutrals but also of neutrals in regard to property of belligerents.'[4]

This view is supported by the Professor of International Law at the University of Grenoble, Basdevant, who states in his study of ' Requisition of German Ships in Portugal '[5] that:

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[1] See Rolin, *loc. cit.*: " Dans le sens le plus général du mot, l'angarie n'est pas autre chose que la saisie, par un belligérant, d'une propriété mobilière quelconque ennemie ou neutre, pour s'en servir dans sa lutte contre son adversaire."

[2] *Loc. cit.*, pp. 275–276.

[3] *Op. cit.*, p. 52.

[4] Accioly, *Tratado de Derecho Internacional Publico*, vol. III (1946), p. 359 ff., No. 1932.

[5] In *Revue Générale de Droit Public*, 1916, pp. 268 ff.

'On the other hand, the German-Portuguese incident provides an example in which right of angary was exercised by a neutral State. Precedent and doctrine show that it was exercised by belligerent States up to that time.'[1]

He adds that this right may not be understood as 'a prerogative based on force'. He sees angary as 'a competence of the neutral State to requisition rolling stock of railroads belonging to belligerents recognized by Article 19 of Hague Convention V of 1907.' To be sure, the idea of giving neutrals the same rights as belligerents has remained in a latent state in international law ever since it was launched by this Convention. What follows is simply the application to ships of the same principle which the Convention made applicable to rolling stock.

"Without a doubt Le Clère was one of the first publicists who sought to place the problem of angary on a more concrete and realistic basis. He considered that the experience of the last two wars justifies resort to angary not only in time of war but also in time of peace in cases of extreme urgency arising out of a civil war or other public calamity. It is necessary to study the bases of the right of angary in order to clarify the principles on which it is sought to support the issue of whether or not angary may be legitimately exercised between neutral countries, which is the subject of the present litigation.

"*Juridical justification of right of angary. Sovereignty and state of necessity.*—Some writers justify right of angary by the so-called theory of eminent domain, *i.e.*, that right which the sovereign State exercises over all property situated in its territory. For example, Professor M. J. Basdevant says:

'. . . The State, by virtue of its territorial sovereignty, has the power to requisition foreign ships. This power is exercised not because of its belligerent status nor because of state of necessity but rather on the basis of its territorial sovereignty.'[2]

Harley finds two bases for right of angary, sovereignty and eminent domain,[3] whereas Paul Fauchille attributes to angary a triple basis: necessity of war, sovereignty, and eminent domain.[4] Rudolph Laun, Professor at the University of Hamburg, confusing angary with requisition, ends by saying: 'the alleged right of angary results from the territorial sovereignty of the belligerent State.'[5] Calvo considered angary to be the prerogative right of the sovereign.[6] In reality, the only sound theories are state of necessity and sovereignty, because 'eminent domain' is the same as sovereignty in the last analysis.[1]

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[1] Basdevant, *loc. cit.*, p. 279.

[2] *Loc. cit.*, pp. 264 ff.

[3] *Loc. cit.*, p. 283.

[4] *Op. cit.*, p. 788.

[5] Laun, "Le Régime International des Ports", in *Recueil des Cours*, 1926 (v), p. 94.

[6] Calvo, *Le Droit International Théorique et Pratique*, 5th ed., vol. III (1896), pp. 138–139.

"Sovereignty as a general concept in international law is an attribute of the State consisting of the political power which it exclusively exercises within a defined territory.[2] This concept may lead to the conclusion that angary as an expression of sovereignty constitutes the arbitrary appropriation of foreign property. Such a view would destroy the theory from the beginning. Force may make for respect for law; but it may not create law and establish the basis in law of an institution designed to serve as a principle on which juridical relations of States are to be founded. As Hugo Grotius put it: 'Law cannot be founded on force; but law may use force in order to achieve its ends.'[3] On the other hand, the traditional concept of sovereignty has been subject to revision. President Wilson after the war of 1914–1918 attacked the concept of absolute sovereignty,[4] while its evolution was proclaimed by Professor Leon Duguit in one of his works, *Les Transformations du Droit Public*. M. J. Gascon y Marin, Dean of the Faculty of Law of Madrid University, says:

'In the evolution of international law it is now easy to see a certain parallel with the development of municipal law. In our epoch we are witnessing the struggle between the principle of the sovereignty of State power and the idea of public service . . . It can be seen that the exigencies of modern times have led us away from the principle of absolute sovereignty of the State to the concept of reciprocal aid, of co-operation, the conditions under which international society provides services through international organizations, thus limiting for all practical purposes the dominion of the national sovereign. The action of the League of Nations in restoring the finances of Austria provides one example.'[5]

"To seek today to erect a juridical institution on foundations so substantially modified as those to which Duguit referred does not seem very commendable. Moreover, since the war of 1914–1918, as Cruchaga[6] has pointed out, it has been possible to observe among international law publicists a current of opinion favourable to the modification of the traditional concept of absolute sovereignty of the State. The treaties and statutes of the United Nations are evidence of the limitations on sovereignty which States have accepted in order to achieve the ideals of international co-operation.[7] Furthermore, as Fauchille[8] and Le Clère[9] have pointed out, angary based on concepts of sovereignty or eminent domain would not affect the high seas.

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[1] See Bello, *Principios de Derecho Internacional* (1844), p. 34.

[2] See Cruchaga Tocornal, *op. cit.*, vol. I (1923), pp. 99–100.

[3] *De Jure Belli ac Pacis*, Bk. I, p. 19.

[4] See Dupuis "Règles Générales de Droit de la Paix", in *Recueil des Cours*, 1930 (ii), p. 24.

[5] Marin, "Les Transformations du Droit Administratif International", in *Recueil des Cours*, 1930 (iv), pp. 16–17.

[6] Cruchaga Tocornal, *op. cit.*, vol. I (1923), p. 99, n. 1.

[7] *Ibid.*, p. 527.

[8] *Op. cit.*, p. 791.

[9] *Op. cit.*, p. 93.

" Grotius's view, to which reference has been made, gains importance with regard to the juridical character of international law, for a society of nations seeking to cultivate friendly relations among the members must submit to rules which thereby establish a juridical order (*ubi societas, ibi jus*). Heffter correctly says:

> ' There exist certain principles which no State desirous of participating in international commerce on a regular basis can ignore and which it assumes that others accept. If they do not, then its relations with them will be strained or broken: There is the right of mutual respect of personality, founded in the necessity of peaceful co-existence; there is the law governing treaties and diplomatic relations on which international commerce rests; there is the law which establishes humane conduct of war.'[1]

The expressions ' international juridical community ', ' society of states ', ' *magna civitas* ', are often used by publicists and denote that an international community is only possible among States which accept a common consensus of moral and juridical ideas, in other words a common juridical conscience. The trend of international law is increasingly juridical.[2]

" To find a basis of the right of angary, it is necessary to seek more suitable and more juridical arguments than those presented to the Court. It would be in better accord with the degree of development of the contemporary juridical conscience to resort to the concept of necessity. Practice supports the view that the concept of necessity, ' though it is not a source of international law ', is basic to it; ' the source is the constant usage or repetition in which necessity is recognized and which comes to be the criterion that States consider inherent or indispensable to international existence.'[3] Furthermore, international law in certain cases admits the plea of extreme necessity as a justification for violation of the law. The writer quoted above, imbued with principles of courtesy and strict justice, points out that in such instances, however, ' apologies must be made to those adversely affected and compensation paid for damage sustained.'[4]

of " The most theoretical and ancient affirmation of the principle necessity in international law comes from one of its founders: Alberico Gentili. Referring to an English order limiting neutral commerce with their enemies, he wrote: ' *lucrum illi commerciorum sibi periro nolunt; Angli nolunt quid fieri quod contra salutem suam*

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[1] Heffter, *Le Droit International Public de l'Europe* (trans. by Bergson, 1886), p. 4.

[2] See Strupp, " Le Droit de Juge International ", in *Recueil des Cours*, 1930 (iii), p. 358.

[3] Hontoria, *op. cit.*, p. 20, n. 2.

[4] Strupp, *loc. cit.*, p. 390.

est.'[1] This concept was later developed by Grotius in more explicit form when he wrote, in the light of contemporary practice:

> 'In a case of extreme necessity, the ancient right of confiscation revives exactly as though the goods were held in common. . . . If one were to ask those who made the first division of common property what they thought of this, they would reply, that we will recompense ourselves.'

What Grotius means is that where possible that which has been taken will be returned. He adds:

> 'The right in this case is not a full and complete right, but rather it is exercised with the proviso that when the condition of necessity ceases, restitution is obligatory; the right can go so far but no further, balancing the right of natural equity against the rigor of the rights of proprietorship.'[2]

Vattel understands right of angary as being one of those rights 'which remain in the nation after dominion and property are established.' He maintains that if a 'nation has urgent need of ships, carriages, horses or the labour of foreigners, it may avail itself of these by agreement or by force.'[3]

"Bello in the same manner justifies necessity as the right to make use of confiscated property as a power inherent in the primitive community.[4] Klüber[5] justifies the appropriation of foreign property for the needs of the State[6] on the basis of necessity and dispenses with the strict observance of justice in favour of a concept of necessity of State.[7] The State which makes use of necessity must do so not only with all possible circumspection, but also provide an appropriate indemnity to those affected by the action. 'Only a plea of necessity', says Heffter, 'gives a legal basis to a nation's defense of exercising its rights at the expense of others. Moreover, the very act involves an offence reparation for which must be made in the form of an indemnity.'[8]

"The state of necessity in permitting the appropriation of foreign property in certain circumstances has been established in international law from the beginning. It is a principle which has penetrated the universal juridical conscience and has modified the penal law of States by providing a basis for justification of certain kinds of actions. Publicists dealing with penal law have elaborated the doctrine and devised various theories. Among the most acceptable is that which bases the state of necessity on the concept that in a dispute over property [*conflicto de bienes*] the greater value prevails. In the same sense, Bello affirms that ' in the conflict of two rights, preference will be given to that of the greater benefit to mankind.'[1]

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[1] Gentili, *De Jure Belli, Comentatio Prima* (1588).

[2] Grotius, *Le Droit de la Guerre et de la Paix* (French trans. and notes by Barbeyrac), Book II, Chapter II, paragraph VI, n. 2 ff.; Vol. I (1729), p. 274, ff.

[3] Vattel, *El Derecho de Gentes o Principios de la Ley Natural aplicado a la conducta de los negocios de las naciones y de la Ley de los Soberanos* (trans. by Manuel María Pascual Hernández, 1834), Book II, Chap. IX.

[4] *Op. cit.*, p. 34.

[5] Klüber, *Droit Moderne des Gens de l'Europe* (notes by Ott) (1874), pp. 64-65.

[6] *Ibid.*: "Status gentis, extraordinarius casus extremae necessitatis."

[7] *Ibid.*: "Favor necessitatis; ratio status seu extraordinarius."

[8] Heffter, *op. cit.*, p. 55.

" From the time of Grotius, it has been commonly accepted that in a period of great peril the right to property may be subject to restriction. It has been believed in principle that such an act may be justified by moral force, but this theory has been recently superseded by another which was first enunciated by Hegel. According to this philosopher, when man undertakes an act of necessity [*hecho necesario*], he may not invoke the excuse of moral force; the impunity of the act must be explained in terms of its extrinsic nature, founded in the objective point of view. The state of necessity is a conflict of right [*conflicto de derecho*] from which emerges a right.[2] Berner, developing this theory, concludes that ' when there is a conflict between unequal rights, the State must protect the superior right.'[3]

" The theory of state of necessity, thus developed, has been crystallized in the so-called objective theory of conflict of rights [*colision de derechos*], which has the most exponents in international law. This theory, German in origin, is supported by numerous jurists: Von Bar,[4] Binding,[5] Luszr,[6] the Belgian Adolph Puns,[7] the Swiss Paul Moreaud,[8] and the French Marchand[9] and Sermet.[10]

" This theory has been elaborated with regard to the problem of compensation, and attempts have been made to reconcile state of necessity with the exigencies of justice. Although in penal law state of necessity justifies the act, freeing it from its illegality, so that in strict logic compensation would not be required, publicists, however, have taken notice of this injustice and have sought a more equitable and just position. They accept the payment of indemnity when the state of necessity is not caused by the person who suffers the consequences but rather by a third person. As Jiménez de Asúa correctly puts it:

' It is cruel and unjust that an innocent party whose goods chance to be in conflict with those of others should suffer thereby a loss for which he is not responsible.'[11]

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[1] *Op. cit.*, p. 119, para. 5. See also Jiménez de Asúa, *Tratado de Derecho Penal* (1952), vol. IV, p. 353 ff.

[2] Hegel, *Grundlinien der Philosophie des Rechts*, 2nd ed. (1833), p. 579.

[3] Berner, *De Impunitate Propter Summam Necessitatem Proposite* (1861), pp. 9–10.

[4] *Gründriss* (1873), p. 10.

[5] *Handbuch des Strafrechts*, vol. I (1885), p. 758.

[6] *Tratado de Derecho Penal*, Spanish ed., vol. II. pp. 340–341.

[7] *Science Pénal et Droit Positif* (1895), p. 262.

[8] *Du Délit Nécessaire et de l'état de Nécessité*, p. 252.

[9] *De l'état de Nécessité en Droit Pénal*, pp. 148 ff.

[10] *L'état de Nécessité en matière criminelle*, p. 182.

[11] *Tratado de Derecho Penal*, vol. IV (1952), pp. 353 ff.

"The state of necessity gives way today to a juridical concept founded in the universal juridical conscience not only of international law but also of penal law. Publicists in the field of penal law, as we have seen, have elaborated the doctrine and agree that justification for seizure of foreign property involves the following conditions: (*a*) existence of actual or imminent danger; (*b*) illegality of the action taken, that is, that the act was not legally initiated; that it was not initiated fraudulently by the actor; that whoever suffers it will not be unprotected; (*c*) necessity of the act, *i.e.*, injury would have followed in the event of failure to act; that there was no other way to avoid it; (*d*) difference between goods saved and goods spent.

"The above discussion relates *mutatis mutandis* to the right of angary when a nation is faced with the consequences of a war which not only affects the commerce of the belligerents but also of the whole world by restrictions, blockades, bombardment, etc. In such circumstances, a State may requisition foreign ships in order to use them to meet the basic needs of its populace. The action taken by the Government of Chile in requisitioning the Danish vessels, however it may be described, appears fully justified before the juridical conscience of any civilized people and before international law.

"Basing the right of angary on a state of necessity is more logical and better juridically, as it permits consideration of the matter of whether requisition was necessary or not. Such consideration would not be possible if we were to grasp blindly at the exercise of a sovereignty which defines right solely in terms of force rather than the power of a verdict emanating from an independent court which gives the parties an equal opportunity to be heard. To argue that the basis of angary is the state of necessity instead of sovereignty is to move from fiction to reality.

"The majority of writers are inclined to support the state of necessity as the justification for the right of angary: Grotius,[1] Vattel,[2] Bullock,[3] Klüber,[4] Harvard School [*sic*: Law School] the American Naval War College, [and] Fauchille.[4] The essence of these opinions is clearly stated in the *Diplomatic Dictionary* where, after noting that Brazil and Peru requisitioned ships, it is pointed out that

> 'Brazil and Peru have both requisitioned German vessels when needed because of submarine warfare. We may be persuaded thereby that certain conditions must exist in order that recourse to right of angary can be defended: in time of war requisition may be justified precisely because of state of necessity but provision must be made for compensation to the owners of the ships.'[5]

"In summary, the idea of justifying the right of angary by the concept of state of necessity has so developed that it may be regarded as an accepted principle of international law. The force of this doctrine is so persuasive that Harley, after treating the problem in terms of the use of power by belligerents, the exercise of right of sovereignty, State prerogative, or as eminent domain,[1] disregards these arguments and resorts to the state of necessity.[2] He says in regard to the precedent established by Portugal in requisitioning German ships: 'the Portuguese needed food and supplies; there was a public necessity to be met.'[3]

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[1] *Op. cit.*, Bk. II, chap. II, p. 10.

[2] *Le Droit des Gens*, bk. II, chap. IX, p. 121.

[3] "Angary", in *British Year Book of International Law*, 1922–1923.

[4] *Op. cit.*

[5] *Dictionnaire Diplomatique*, published by M.A.F. Frangullis, Paris.

" Accioly raises the same questions as did Harley—territorial sovereignty or *dominium eminens* of the State,[4] and, like him, ends by recognizing the justification of angary on the basis of necessity. He conditions this view, however, by saying that it must be 'evidenced by war or national crisis.'[5] Azuni sees angary as a prerogative of the Supreme Power, as a royal prerogative (*droit regalien*) by which the Sovereign Power may benefit in case of necessity or public need.[6] The publicists of the Harvard School [*sic:* Law School] (Research in International Law of Harvard Law School), in the face of so much doctrinal precedent, establish as the first principle of angary 'the existence of urgent necessity'.[7]

" *Angary and requisition.*—After clarifying the theory, content, and basis of angary, it remains to consider the characteristics which differentiate it from requisition in view of the fact that this term was used in the decrees which ordered the seizure of the Danish ships and because in Conclusion No. 15 of the decision under appeal, it is held that 'the present action concerns requisition and not angary.'

" The terms 'angary' and 'requisition' are not in reality mutually exclusive because the language of international law has included under the name of angary the requisition of seagoing ships by a foreign sovereign. In volume VI of the *Digest of International Law* one reads at p. 655: 'With respect to the requisition of vessels by neutrals, sometimes regarded as a type of angary, see Vol. VII, p. 677, of this *Digest.*' This reference enumerates cases in which such countries as Portugal, Brazil, Peru, Uruguay, Spain, the United States, etc., have exercised right of angary, and among these appears the type of case which is the subject of this litigation.[8] Publicists are in agreement on this point. Paul Fauchille[9] says: 'Requisition of ships is known especially in international law as right of angary (*jus angariae*).' Later he adds: 'If the expression "angary" is more particularly employed to designate the right of requisition of ships, it is owing to the considerable importance which this right involves. Angary is only a form of requisition.'[1]

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[1] *Loc. cit.*, p. 283.

[2] *Ibid.*, pp. 284–285.

[3] *Ibid.*, p. 285.

[4] Accioly, *op. cit.*, vol. III, p. 359, no. 1837.

[5] *Op. cit.*, p. 363, no. 1843.

[6] Azuni, *Droit Maritime de l'Europe* (1805), chap. V.

[7] See Hackworth, *Digest of International Law*, vol. VI (1943), p. 368. (Hackworth was Legal Adviser to the Department of State.)

[8] *Ibid.*, vol. VII, p. 545.

[9] *Traité de Droit International Public*, vol. II (1921), p. 788.

" No doubt angary is juridically a requisition; it has all of its characteristics: the procedure justified by abnormal circumstances, taking possession by the authority of the State, security of an indemnity for deprivation of enjoyment, restitution of the object when abnormal conditions have ceased, or payment of appropriate money damages in case of loss of the object. Requisition involves the following conditions:

" (*a*) The requisition of national ships is exclusively a matter of municipal law which has no contact with international law. On the contrary, angary of a foreign ship is essentially a matter of public international law because it concerns the internal régime of the flag State.

" (*b*) Municipal law fixes the conditions of time, place, and the form of requisition, in written law; angary is customary law.

" (*c*) All modern States have some rules relative to the manner of indemnification of those affected and endeavour to limit the indemnity paid by the State to a minimum. This concept is justified by an idea of national solidarity concerning war damage; but there is no reason to apply the same criterion of national solidarity to foreigners. As Lawrence says: ' Belligerents make war with their own resources and with what they can capture from their enemies, without affecting the property of neutrals.'[2]

" (*d*) Requisition of ships implies, frequently, requisition of the services of the crew; on the contrary, angary involves only the requisition of the bare boat [*cuerpo desnudo*].[3]

" Among the characteristics differentiating angary from requisition, the most important is that relating to the international régime of maritime shipping, with special reference to foreign ships, because the foreign merchant ship is subject to a juridical régime distinct from that of national ships or from other goods located in national territory. The requisition of foreign ships or airplanes is a different matter from requisition of a national ship or other forms of foreign property, in contravention of what is stated in the last part of Conclusion No. 15 of the trial Court. In the first case, requisition involves a conflict of sovereignty, that of the State whose flag covers the ship and that of the State in whose territorial waters the ship happens to be found. On the other hand, other forms of foreign property involve no such conflict because such property is subject to the sovereignty of the State in which it may be located. The sovereignty of a State as a general rule has no effect outside its own territorial limits.

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[1] " Cette réquisition de navires est ce qu'on appelle spécialement en Droit International le droit d'angarie (*jus angariae*). . . . Si l'expression d'angarie est plus particulièrement employée pour désigner le droit de réquisition sur le navire c'est à cause de l'importance considérable que ce droit présent. L'angarie n'est pas autre chose qu'une forme de réquisition."

[2] Lawrence, *The Principles of International Law* (1910), p. 626.

[3] See Le Clère, *op. cit.*, pp. 30–31.

"In summary, it must be recognized that there are generally accepted criteria which differentiate angary from simple requisition, and in accordance with these criteria it must be concluded that the requisition made by the Government of Chile constituted the exercise of right of angary. Actually: (*a*) the use of the five Danish ships was requisitioned by public authority; (*b*) there existed compelling reasons of necessity; (*c*) the flag was changed on the requisitioned ships; (*d*) the crews were disembarked, *i.e.*, their personal services were not requisitioned; (*e*) the Government of Chile recognized the obligation to pay an indemnity for the use of the ships and to provide for the maintenance of their personnel. Consequently, and no matter what name is given to it, the requisition or the taking of possession by which the State of Chile made use of the Danish ships constituted and is understood in international law as right of angary. Le Clère so defines it in affirming that it is

> 'a fundamental right of sovereign States, consecrated by doctrine, by international custom, and by certain treaties, involving the requisition, without other formality, of foreign merchant ships in case of imperative necessity which may take place in time of peace or in time of war.'[1]

He lists the criteria of angary as follows:

"'I Angary is subject to international juridical rule, *i.e.*, it may only be exercised by sovereign States.[2]

"'II Right of angary may only be exercised in cases of absolute necessity.[3]

"'III Angary may only be exercised by governmental authority.[4]

"'IV Angary affects only the instrumentality itself [*cuerpo del navio o del aviòn*], excluding the crew.[5]

"'V Angary temporarily transfers authority over the ship to the requisitioning State (change of flag).[6]

"'VI Angary assumes the payment of an indemnity.[7]

"*Right of angary exercised by neutrals. International custom.*—The trial Court stated in its Conclusion No. 15, to which reference has been made:

"'In order to sustain the thesis that right of angary may be exercised today by neutrals, the opinion of Julien Le Clère has been cited, together with opinions of Professor Ernesto Barros Jarpa, a member of this Court,

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[1] *Op. cit.*, p. 19.

[2] "L'angarie portant atteinte à un statut juridique international ne peut être exercée que par les Etats souverains."

[3] "Le droit d'angarie ne peut être exercée qu'en cas de nécessité absolu."

[4] "Pour qu'y ait angarie, il faut un acte autoritaire."

[5] "L'angarie ne porte que sur la coque du navire ou de l'avion, à l'exclusion de l'équipage."

[6] "L'angarie transfère temporairement le droit de police sur le navire à l'état angarient (changement de pavillon)."

[7] "L'angarie comporte toujours le paiement d'une indemnité."

Franklin Quezada, Alejandro Alvarez and others; but these opinions do not constitute norms or principles of international law, and many older publicists may be cited to the contrary, among them the Chileans Bello and Cruchaga, not to speak of the view expressed by the Government of Denmark in repeated *notes verbales* from its Legation, in which it clearly states that neutrals cannot exercise right of angary. . . .'

" The above statement is equivocal. Actually, the list of writers who accept the exercise of the right of angary by neutrals includes not only those mentioned in the trial Court's decision but also such men as Accioly, Basdevant, Bullock, Fauchille, etc. Apart from this it is not correct to state that Bello and Cruchaga maintain that the right of angary cannot be exercised by neutrals, as Bello, in referring to angary in his *Principios de Derecho Internacional*,[1] does not treat the problem; and Cruchaga in his *Nociones de Derecho Internacional*[2] says: ' But the exercise of the *jus angariae* in peacetime is not admitted by doctrine nor practice *save on condition of assurance of adequate indemnity*.' Moreover, the opinion of the Government of Denmark has been invoked. Respectable as this opinion is, it should be pointed out that the Danish Government is not a party to this litigation and that its right to express an opinion in the matter has no more weight than that of tradition, when one bears in mind the fact that Denmark has never accepted angary. The oldest treaty containing a clause in opposition to the exercise of angary is that concluded between France and Denmark in 1645.[3]

" In addition to the opinions of the above publicists, there also exist other sources which support the principle that the trial Court rejected. Many international treaties recognize exercise of angary in case of necessity. For example, the one concluded between Great Britain and the Netherlands in 1654 provides in Clause XIX:

> ' That merchants, masters, and seamen of the two parties, their ships, goods, food, and stores may not be detained nor confiscated on land, sea, highways, or rivers of the other, for use in war or other use, by virtue of any general or special order, save under *extraordinary necessity* and on payment of an indemnity.'[4]

The Treaties between the United States and Prussia (1799), the Netherlands and Guatemala (1856), Great Britain and Portugal (1914), and others cited in the opinion of Barros Jarpa, in the record, at p. 4.097, contain analogous declarations.

" In sum, it is appropriate to note the Treaties concluded between Chile and France of 1846 and with Belgium of the same year, which provide for the requisition of ships even in time of peace. According to Article 6 of the Treaty with France:

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[1] 2nd ed. (1844), p. 83, para. 5.

[2] 2nd ed., vol. II (1925), p. 198, no. 978.

[3] See Hautefeuille, *op. cit.*, p. 231.

[4] Cited by Bullock, *loc. cit.* The Report of Professor Ernesto Barros Jarpa appears at pp. 265–324 of the book published by counsel for the plaintiff, Arturo Alessandri R. and Victor Santa Cruz S., entitled, *Defensa de los Armadores Daneses en juicio contra el Fisco por la requisación de Naves por el Estado de Chile* (1941 *à* 1946), 1955 (ed. note).

> ' The nationals of either State may not be subjected to embargo nor to detention with their ships, cargoes, goods, or effects, for a military expedition nor for any other public or private use, without payment of an indemnity previously agreed upon by the interested parties, likewise the payment of sufficient compensation for the use, or indemnity for damage, losses, or delays which may result from such forced service.'

A similar provision appears in the Treaty with Belgium.

" These treaties, as a whole, reveal the existence of sufficient international practice so as to demonstrate the existence of custom. In the last analysis, it is practice which counts. The treaty is only the manifestation of a practice which forms an integral part of the custom; and if one considers it as a source of law, separating one from the other, for reasons of convenience, the treaty may appear different because a written text is clearer and more concrete than a customary norm.[1]

" *International custom.*—The same norm reproduced in the Treaties to which reference has been made and clarified by doctrine appears in the international practice emerging from the last two wars. During the first war (1914–1918) when Germany commenced submarine warfare, a great many neutral ships were immobilized in ports and refused to sail for fear of being torpedoed. Thus both belligerents and neutrals lacked the ships to enable them to engage in that international commerce necessary to the support of their economies. The right of angary permitted the utilization of the immobilized ships.

" As examples of the exercise of right of angary by neutral countries during the first war, the following may be cited: Italy—the Italian Government under Decree of June 17, 1915, requisitioned 21 Austrian ships which were in Italian ports, Italy was then neutral, war being declared by Germany on August 28, 1916;[2] Portugal—this is a typical case of angary. The Portuguese Government, by Decree-Law of February 7, 1916, and a subsequent Decree of February 23 of the same year, requisitioned 80 German ships which had taken refuge in Portuguese ports;[3] Brazil—in April 1917, while neutral, Brazil requisitioned 44 German ships and 4 Austrian ships;[4] Spain—requisitioned various German ships on August 10, 1918, although it was not at war;[5] Peru—on September 29, 1917, the Peruvian Government took possession of 6 German steamships and

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[1] See Hontoria, *op. cit.*, p. 124.

[2] See Hackworth, *Digest of International Law*, vol. VI (1943) p. 642; Le Clère, *op. cit.*, p. 48.

[3] See Le Clère, *op. cit.*, p. 48; Hackworth, *Digest*, vol. VII, p. 530; Basdevant in *Revue Générale de Droit International Public*, 1916, p. 268.

[4] See Hackworth, *Digest*, vol. VII, p. 531; Le Clère, *op. cit.*, p. 49.

[5] See Hackworth, *Digest*, vol. VII, p. 538.

4 German sailing ships present in Peruvian waters; on January 30, 1918, a law was promulgated anthorizing requisition of foreign ships for essential public services in maintenance of the national economy, but on condition of paying compensation;[1] on October 3 of the same year, Peru requisitioned 14 German ships;[2] United States—on April 6, 1917, before the declaration of war against Austria-Hungary, the United States took possession of Austro-Hungarian ships in American ports;[3] on June 15, the President was authorized to dispose of all ships found under the jurisdiction of the United States; in pursuance of this law, the United States requisitioned certain Danish ships in March 1918; in a proclamation dated March 20, the President had declared that belligerents had the right to requisition neutral ships anchored in their ports for use in case of necessity in the prosecution of war, and his seizure of the Danish ships was based on this law;[4] China—requisitioned 9 German and Austrian ships in June 1917;[5] Argentina seized 12 German ships in November 1918 on the eve of the Armistice, but it did not utilize them because the Armistice obviated the tonnage problem.[6]

"During the second war (1939–1945), the right of angary was exercised many times by neutral States, as the following examples demonstrate: Mexico—took possession of 9 Italian and 2 German ships on April 1, 1941;[7] Argentina—requisitioned 3 French ships in July 1943;[8] United States—in pursuance of the Law of June 6, 1941, which authorized the President to requisition or acquire for use such foreign merchant ships as might be within the jurisdiction of the United States, in the Philippines, or in the Canal Zone, requisitioned ships as follows—2 German, 28 Italian, 11 French, 39 Danish, 2 Spanish, 1 Rumanian, and 1 Lithuanian;[9] Union of South Africa—in a proclamation of February 5, 1941, announced that it reserved the right to requisition foreign ships, as other countries had done, when it was not at war.[10]

"One cannot ignore the fact that the exercise of the right of angary by neutral countries exists as a uniform practice of various States. Recognition of this practice culminated in the Act of April 26, 1941, emanating from the Inter-American Financial and Economic Advisory Committee, an organization which has had great influence on the international life of the South American Republics, which Act was signed by Chile and other South American States.

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[1] See Hackworth, *Digest*, vol. VII, pp. 534, 537.

[2] See Le Clère, *op. cit.*, p. 50.

[3] See Hackworth, *Digest*, vol. VI, p. 643; Le Clère, *op. cit.*, p. 50.

[4] See Le Clère, *op. cit.*, p. 49.

[5] *Ibid.*, p. 50.

[6] *Ibid.*

[7] See Hackworth, *Digest*, vol. VII, p. 546.

[8] See Le Clère, *op. cit.*, p. 68.

[9] *Ibid.*, p. 72.

[10] *Ibid.*, p. 65.

The text appears in the *Digest* at page 127, in Conclusion No. 18 of the decision under appeal, and in the *Record* at page 474.

" *Compensation. Primacy of International Law.*—As it has been proved that the Chilean Government, in the exercise of the legitimate right of angary, requisitioned five foreign ships owned by the plaintiffs, it is proper now to determine what injury this act caused the plaintiffs and what principle should be used for assessment of indemnification.

" Plaintiffs argue that there must be full compensation, that is, that it must include the payment of a just compensation for the use of the requisitioned ships, and reparation for all damage [*perjuicio*], without any deduction, restriction or limitation whatsoever. They invoke the principles of international law. On the other hand, the defendant does not consider itself to be bound to pay other compensation than that equivalent to the amount of profit [*monto de la utilidad*]. The defendant maintains that Chilean laws are applicable (Section 24, Law No. 6415; Section 27, Law No. 7200) and argues that all claims for *lucrum cessans* must be rejected.

" The issues raised are of transcending importance for the determination and regulation of damages. In fact, it has been shown that there exists no law which provides for the payment of damages as the result of requisition of foreign ships; nor does the present case result from a contractual relation, or a tort or quasi-crime. Nobody has questioned the legality of the Chilean Government's act of requisitioning the ships in pursuance of the right of angary. Nevertheless, the issue is to find out whether the principles of international law, or the general principles of equity, which are embodied in our laws, are applicable. We draw this conclusion from Section 24 of the Civil Code and from Section 170, para. 5, of the Code of Civil Procedure, which require judges to declare, in case of *lacunae* in the law, the principles of equity on which the decision is to be made. It is for that reason that Section 10 of the Judicial Code binds the judges to decide complaints brought before them even in the case of lack of special provision applicable to the question at issue.

" Once the possibility of applying Laws No. 6415 and 7200 is eliminated, as has been demonstrated, and because there are no express provisions of law that regulate the present case, there remain to be considered the principles of equity according to which the problem may be solved. As will be shown below, international law has established the principles that regulate the amount of compensation due in the case of angary; it is recognized that in such cases international law prevails over the principles of municipal law.

" In fact, the compensation due as the result of the exercise of right of angary would be illusory if it were to be regulated by Chilean municipal law, Chile being one of the parties to the dispute. Such a situation would be at variance with the most elementary principles of equity and equality which must exist in the relations between States. International law and justice are founded on the same principles of equity and equality that must exist between States. According to international law, no State may exercise with respect to nationals of other civilized States the power of eminent domain; in other words, no State may impose its sovereignty on them without respecting property rights of aliens or without paying them just compensation as determined by an impartial tribunal.[1] International custom has invariably given preference to the principles of international law.

"For example, in a decision handed down by the Permanent Court of Arbitration at The Hague, in the case of a claim of Norway against the United States regarding the requisition of ships during the First World War, the Tribunal said that it was not bound by provisions of municipal law in so far as they restrict the right of claimants to receive immediate and full indemnification, with interest from the date the compensation should have been paid *ex aequo et bono*.[2] The same jurisprudence was followed in the decision by the aforesaid Tribunal [*sic*] in the case concerning the neutrality of the Kiel Canal, resulting from the attempt made by the British ship *Wimbledon* in 1921 to go through it. The Permanent Court of International Justice established the following principle: 'Municipal law cannot prevail over international law.'[3] Another example is furnished by the case of the British Government's requisition of the Swedish ship *Zamora*.[4] In regard to this act, the Judicial Committee of the Privy Council, in a decision of April 7, 1916, declared that British prize courts are not bound by municipal law because international law must have primacy.

"The application of any of these principles is not a matter of indifference because if the principles of equity are applicable, the action *in rem verso*, or unjust enrichment, could be exercised. This action, as is known, is founded on the equitable principle which prohibits one from enriching himself to the disadvantage of another; but as Baudry-Lacantinerie has observed, in this case the plaintiff has no actionable right except in so far as he has been impoverished, and the defendant cannot be sued except for that amount equivalent to his enrichment. The action would be doubly restricted.[5] On the other hand, if the norms of international law are followed, the indemnification would not have such restrictions as has been shown. It is now appropriate to consider the problem of indemnification arising from the right of angary in relation to the principles of international law.

"Although it is true that the right of angary, through its evolution, has provoked controversies in regard to its constitutive elements or its origin and development, nevertheless the only point on which there has always been agreement is that relating to the payment of an indemnity to the owners of the ships and other injured persons by the State which exercised the right of angary. This rule is proclaimed by the Harvard Law School, which recognized the lawfulness of the right of angary on compliance with three requisites: (*a*) existence of urgent necessity; (*b*) voluntary presence of the ship within the territory of the belligerent; and (*c*) the payment of compensation. The Law School concludes that there is no agreement except with respect to the third point.[1]

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[1] See Whiteman, *Damages in International Law*, vol. II, p. 1074.

[2] *Ibid.*, p. 1075 [*Norwegian Shipowners' Claims* (*Norway* v. *United States*): *Reports of International Arbitral Awards*, vol. I, p. 307].

[3] Cited by Cruchaga, *Derecho Internacional*, vol. II (1948), pp. 162–163.

[4] Cited by Colombos, *The International Law of the Sea*, pp. 392, 394.

[5] Baudry-Lacantinerie, *Précis de Droit Civil*, vol. II (13th ed., 1925), p. 309.

" The obligation to indemnify was already hinted at in Hugo Grotius's time, for he recommended in these cases ' to make good the loss ';[2] *i.e.*, to restore it, to blot it out, as though it had not existed. This thought is clearly stated in the second volume of the American writer, Marjorie M. Whiteman,[3] entitled *Damages in International law* :[4] ' Grotius state said [*sic.* stated], fault creates the obligation to make good the loss.' This concept, according to Whiteman, leads to three problems: to the responsibility of the State, to the existence and extent of the losses, and to the amount of compensation which is necessary to ' make good the loss '.[5]

" The responsibility of the State with regard to foreigners has received special consideration by many writers on international law. Cruchaga says: ' All the authors agree that there is a duty to compensate for services rendered by ships, especially when their owners are aliens.'[6] Calvo states that

> ' the responsibility of Governments relative to aliens cannot be greater than that owed to their own nationals. In fact, it cannot be argued that the right of hospitality should restrict the right which belongs to a Government to avail itself of every legal means to assure the preservation of the State, nor that aliens should enjoy a privileged situation. Compensation for damages is a guaranty against the injuries caused by *force majeure* or by the imperative necessity imposed by the public wellbeing.'[7]

" The duty to indemnify as a consequence of the exercise of the right of angary has been recognized from time immemorial. Grotius described the Greek action on the occasion of the retreat of ' the Ten Thousand ':

> ' Graeci qui cum Xenophonte erant, cum navibus omnino opus haberent, ipsius Xenophontis consilio ceperunt transeuntes, sed ita ut

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[1] See Le Clère, *op. cit.*, p. 69.

[2] See Grotius, *op. cit.*, vol. II, chap. XVII, sec. 1.

[3] Assistant to the Legal Adviser to the Department of State.

[4] Published in 1927.

[5] See Whiteman, *op. cit.*, vol. II, p. 829.

[6] *Nociones de Derecho Internacional*, vol. II (3rd ed., 1925), p. 198, no. 978.

[7] See Calvo, *Le Droit International Théorique et Pratique*, vol. III, (5th ed. 1896), p. 138; Fiore, *Nouveau Droit International Public*, vol. I, (2nd ed., 1885), p. 575, no. 664.

merees dominis intactas conservarent. Nautis vero et alimenta darent et pretium persolverent jus quod jam diximus necessitatis.'[1,2]

Moreover, as another historical example, reference has been made [at p. 714] above, to the decree issued by Bonaparte establishing clearly the right to full compensation, a concept of ancient origin by that time. Notwithstanding the fact that indemnification is stipulated in that decree [of Bonaparte] this does not constitute the first recognition of the right of compensation, as Harley believes, because custom had already established it in Europe. This view is supported by Vattel[3] and by Emerigon.[4]

" Whether because of the wide acceptance of international custom or because of the repercussions of the Napoleonic decree, it is a fact that the customary norm crystallized very soon in the form of provisions in commercial treaties stipulating that compensation be paid in cases of angary. Harley mentions some Treaties,[5] among them one concluded between the United States and Prussia on July 11, 1799, which provided:

' The owners of ships which have been detained for use in military expeditions or for any other purpose, shall receive, from the Government that used them, an equitable indemnification, both for the charter as well as for any loss caused by delay.'[6]

The same provision appears in the Treaties concluded between Chile and France (1846) and Chile and Belgium. Consequently, these Treaties prove the existence of a customary rule, *i.e.*, the payment of full compensation for the damage caused through the use made by the States of the requisitioned ships.

" Even in the absence of treaties, the same rule prevails: (*a*) during the Franco-Prussian War in 1870, Prussia sank several British ships, but it paid appropriate compensation;[7] (*b*) during the First World War, indemnification was frequently made for requisitions; publicists cite the following instances: Brazil,[8] Peru,[9] Portugal,[10] the United States and Great Britain,[11] and Italy;[12] (*c*) lastly, the Second World War offers numerous examples enabling us to conclude that the duty to pay compensation as a condition for the exercise of angary is an international American doctrine.

" The origin of this doctrine is found in the Inter-American Agreement adopted by the 21 nations of this Continent. In 1939 a

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[1] Grotius, *op. cit.*, vol. XII, chap. 2, p. 10.

[2] Rolin, *loc. cit.*, p. 22.

[3] *Droit des Gens* (1775).

[4] *Traité des Assurances* (1783), cited by Le Clère, *op. cit.*

[5] *Loc. cit.*, pp. 270 ff.

[6] *Loc. cit.*, p. 290; see also pp. 271–272.

[7] See Harley, *loc. cit.*, pp. 289, 300; Fauchille, *op. cit.*, vol. II, p. 787.

[8] See Accioly, *op. cit.*, vol. III, p. 366, no. 1848.

[9] See *Ibid.*, p. 365, no. 1846.

[10] See Le Clère, *op. cit.*, p. 48.

[11] See Harley, *loc. cit.*, p. 290; Cruchaga, *Nociones de Derecho Internacional Público*, 3rd ed., p. 205, no. 984; Le Clère, *op. cit.*, p. 50.

[12] See Harley, *loc. cit.*, p. 294.

meeting of the Ministers of Foreign Relations was held in Panama. An Inter-American Economic and Financial Advisory Committee, composed of 21 experts, and located at Washington, was created by Resolution IV. On April 26, 1941, this Committee adopted Resolution XIX, the text of which appears in paragraph 18 of the judgment under appeal. In this Resolution, the right of angary is tied to payment of compensation which is 'just and adequate, according to the generally accepted rules of international law and to the municipal law of each of the American Republics.' In determining this compensation, damage caused by the requisition should be taken into account. All of the American Republics, including Chile, approved this Resolution.

"The American Republics which exercised the right of angary paid, as agreed, compensation for the use of the requisitioned ships, and for other damage inflicted. The following cases, cited by Le Clère[1] and Hackworth,[2] should be mentioned: Mexico exercised the right of angary with respect to the French ship *Merope* under the terms of a decree of August 21, 1942, signed by the President of the Republic. Paragraph 6 of the decree provided:

> 'Whereas international doctrine recognizes to belligerent states the traditional right of angary, in the exercise of which they can requisition such means of transportation belonging to a neutral state or to its nationals which may be under their jurisdiction on condition that the lawful owner be duly compensated for the seizure of his property and that the crew receive proper attention.'

Article 3 of this decree provided:

> 'The Ministry of the Interior shall take the necessary steps for the repatriation of the crew, and shall give to the officers and seamen appropriate treatment.'

Article 4 added:

> 'The Ministry of Finance shall place at the disposal of the Ministry of the Interior the necessary funds for the execution of this order and shall fix the indemnification that shall be due for the requisitioned ship.'

"On July 27, 1943, Argentina requisitioned the ships *Formosa*, *Campana*, and *Katiola*, and published a decree similar to that of Mexico.[3] The Argentine precedent appears at page 9468 of the *Diario de Sesiones de la Cámara de Diputados Argentina*, April 9, 1947 (p. 2910 ff.) It is based upon the following Articles of the decree:

> "'Article 2. According to the provisions of the Inter-American plan for the use of the immobilized ships in the ports of the Continent, the General Administration of the Merchant Fleet of the State shall take charge of the mobilization and use of the ships mentioned in Section 1.'

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[1] See Le Clère, *op. cit.*, pp. 65, 66.

[2] See *Digest*, vol. VII, p. 546.

[3] See Le Clère, *op. cit.*, p. 68.

> " ' Article 4. The General Administration of the Merchant Fleet of the State shall take all necessary steps in order that the owners of the said [requisitioned] ships may be justly and adequately compensated, and, to that effect, the prices fixed by other countries in similar cases and international agreements providing for the acquisition of other foreign flag ships which are in force, shall be taken into account. From the amount of compensation shall be subtracted all expenses incurred in outfitting the ships, and in discharging all other obligations caused by the stay of the ships in the Port of Buenos Aires. Whatever form of compensation may be adopted, the funds shall be deposited with the Central Bank of the Argentine Republic until the end of the war, and they shall not be used in financial transactions of any nature whatsoever.'
>
> " ' Article 5. The officers and crew of foreign nationality who serve in said ships shall be disembarked, and as long as they remain in Argentina, they shall receive a monthly pension for maintenance expenses proportionate to their rank. The sums necessary to comply with this provision shall be subtracted from the compensation provided for in the preceding section.'

" On the other hand, municipal legislatures, by adopting laws relating to angary, have provided, as a logical consequence, for the payment of compensation. Thus, for example, the United States Naval Code for Time of War of 1900, provides in Article 6:

> ' If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed. . . . An indemnity will be made to the owners and if possible will be agreed upon before the ship is requisitioned.'[1]

The Act of June 6, 1941, authorized the President of the United States to requisition, for reasons of national defence, immobilized foreign ships on condition " of paying just compensation for the requisitioned ship ".

" Generally speaking, the compensatory concept was emphasized by the International [*sic.* Inter-American] Financial Advisory Committee in the Resolution already mentioned, in that it recommended to the Governments of the American Republics, acting in defence of their national economies, the use of the immobilized ships on condition of ' just and adequate compensation for the utilization of the vessels '. The same principle appears in Peruvian Law No. 2696 of January 30, 1918.[2] It also is stated in Brazilian Law No. 4263 of January 14, 1921, which in Article 15 regulated military requisitions, and in Decree No. 17859 of July 21, 1927, which dealt with the payment of compensation.[3] Although the Chilean laws do not contain provisions about the requisition of foreign vessels but only about Chilean ships, they establish the principle of compensation, as for instance, in Article 24 of Law No. 6415.

" It is necessary to add to the precedents mentioned above those which follow from the decisions of international tribunals, which precedents not only strengthen the principle of the duty to compensate for damage but throw light upon the nature and extent of this duty.

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[1] See Hackworth, *Digest*, vol. VI, p. 638.

[2] *Ibid.*, vol. VII, p. 534.

[3] See Accioly, *op. cit.*, vol. III p. 362, no. 1841.

" (a) For example, among the many cases cited by Whiteman[1] appears a commentary about the Award of October 13, 1922, rendered by [a Tribunal of the Permanent Court of Arbitration] at The Hague[2] composed of a representative of the United States, Norway, and Switzerland, respectively. It held that Norway had a right to obtain just compensation for the requisition made by the United States of several vessels under construction. Furthermore, the concept of 'just compensation' was defined. Whiteman says:

> 'Just compensation implies a complete restitution of the *status quo ante*, based, not upon future gains of the United States or other powers, but upon the loss or profits of the Norwegian owners as compared with owners of similar property.'[3]

This decision is also important for the declaration made therein that international law prevails over municipal law.[4]

" (b) Another decision to which Whiteman refers is that handed down by the Court of Claims in a suit filed by the French Compagnie Générale Transatlantic. The American Court, in a decision of December 5, 1927, held for the plaintiff, ordering the payment of compensation for the requisition in 1917 of a ship belonging to said company. This decision established as a principle that just compensation was that sum which would put the owner in as good a position pecuniarily as if his property had not been taken.[5]

" (c) Another award rendered by the same Court, and cited by Whiteman,[6] was made in the suit by the Netherlands against the United States for the requisition of the ship *Zeelandia*. The suit was brought by Royal Holland Lloyd, owner of the Dutch ship, and came before the Court of Claims in 1932 [*sic*. actual date of decision was December 7, 1931[7]]. Damages were determined according to the principles of international law.

" (d) In the judgment rendered by an arbitral commission established by the United States and Venezuela empowered to decide on the requisition by Venezuela of the ship *Protecto*, it was held:

> 'The right of a State under pressure of necessity to requisition private property cannot be questioned; but, at the same time, there is an obligation to pay just compensation to the owner.'[8]

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[1] *Op. cit.*, vol. I, pp. 64 ff.

[[2] *Norwegian Shipowners' Claims* (*Norway* v. *United States*): *Reports of International Arbitral Awards*, vol. I (1948), p. 307.]

[3] *Op. cit.*, p. 1073.

[4] The text of the decision is also published in A.J., (1922), p. 362.

[5] *Op. cit.*, p. 1092.

[6] *Op. cit.*, vol. II, pp. 1123–1124.

[[7] *Royal Holland Lloyd* v. *The United States* (*The Zeelandia*): 73 Ct.Cl. 722; *Annual Digest*, 1931–1932, Case No. 229; *A.J.*, 26 (1932), p. 399.]

[8] See Whiteman, *op. cit.*, vol. II, p. 1137.

" Publicists have done nothing more than to acknowledge and verify the fact that payment of full compensation is linked to the right of angary. See, for instance, Le Clère,[1] [and] Bullock [who] in his article entitled ' Angary ',[2] summing up the conditions that [exercise of the] right of angary must satisfy, concludes that it may be exercised only in time of national emergency and subject to the payment of full compensation. Hildebrando Accioly[3] says that

> ' according to several publicists as well as conventional international law, and the municipal law of various States, the right of angary cannot be exercised save on payment of an indemnity.'

Paul Fauchille is of the same view,[4] as are Professors Pearce Higgins of the University of Cambridge and C. John Colombos of the University of London,[5] who point out that ' payment in full by way of compensation must be made to the owners of the vessels and goods requisitioned.'[6] The Argentine writer Calvo agrees:

> ' The universally settled rule on this subject is that every Government, when compelled by the circumstances to have recourse to right of angary, is not only responsible for the material damage [*consecuencias*] sustained by the vessel taken under right of angary but also must give an opportunity to the owners, before exercising angary, to discuss the amount of compensation due for the requisitioned service.'

He adds:

> ' Yet the right of angary, by its nature, belongs to the category of imperfect rights [*derechos imperfectos*], and a great many treaties have formally forbidden it or have admitted its use on condition of prior payment of a just pecuniary indemnity.'[7]

He finds support for this assertion in numerous Treaties that he cites.[8] Harley does not argue about the legality of the obligation to pay compensation because he considers that it is implicitly accepted. He deals only with the difficulties that are presented in determining the amount of compensation. After criticizing the fact that a country may unilaterally assess the amount, he concludes: ' In view of the experience of the present war, it would be well for the sake of the sanctity of treaties that the clauses of same provide for advance payment.' He recommends that a clause might be added providing that the amount of indemnity be fixed by a commission of experts.[9]

" Consistent with the principle expressed above, the *Diplomatic Dictionary*, to which reference has been made, sees right of angary as subordinated to the payment of compensation. It is not possible, then, to have doubts about the necessity of indemnity as compensation for the damage caused by the requisition of the ships because it is authorized by international custom, the doctrine of publicists, and because it is in agreement with the contemporary juridical conscience which sees in equity a principle of eternal justice. For that reason unjust enrichment at the expense of another is not admissible.[1]

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[1] *Op. cit.*, p. 64.
[2] *Loc. cit.*, pp. 19 and 129.
[3] *Op. cit.*, vol. III, p. 363, No. 1842.
[4] *Op. cit.*, vol. II, p. 791.
[5] *The International Law of the Sea* (1945).
[6] *Ibid.*, p. 390.
[7] *Op. cit.*, vol. III, p. 139.
[8] *Ibid.*, p. 139, n. 1.
[9] *Ibid.*, p. 301.

" The Chilean Government could not but recognize its obligation to indemnify the owners of the Danish ships. This was expressly declared in the Supreme Decrees No. 310, providing for the requisition of the vessels *Lotta*, *Helga*, and *Frida*, and No. 819, which authorized the requisition of the rest of the ships (texts of the decrees appear above [*supra*. pp. 712 and 713 respectively]). There is evidence of this recognition in the documents furnished by the Ministry of Foreign Relations. In the documents found on pages 24, 27, 30, 32, 38, 46, 48, 50, 60, and especially at page 66, of the record, it appears that the Chilean Government paid a sum of money as compensation to the plaintiffs.

" Recognition of the obligation to compensate in cases like the present one is well-settled legal principle in our national legislation. Thus Article 10, paragraph 10, of our Constitution authorizes exercise of the right of expropriation for reasons of public utility only on payment of compensation agreed upon with the owner of the expropriated property or determined in appropriate legal proceedings.

" From what has been said before, it is clearly demonstrated that there exists an undisputed principle of international law which compels the State requisitioning foreign ships to pay compensation without restrictions. Thus the issue raised in the present *litis* is to find out whether the amount paid by the defendant is enough compensation for the damage claimed by the plaintiff.

" *Compensation for the sunken vessels*. Damnum emergens.—Full compensation must include *damnum emergens* as well as *lucrum cessans*. Regarding *damnum emergens*, as Whiteman says, the term is understood to mean compensation for the loss actually suffered,[2] that is, in the present case, the actual loss, or the impoverishment, or shrinkage suffered by the patrimony of the plaintiffs because of the sinking of their three ships. This matter will be discussed immediately.

" Referring to this problem Le Clère says:

> ' In the case of loss of the ship during the time of angary, the State which exercises the right of angary (*l'Etat angariant*) must pay in cash [*en valor*] or deliver another ship to replace it.'

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[1] " Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiorem." *Digest*, L. 50, title VII, sec. 206.

[2] *Op. cit.* vol. III, p. 1838.

He adds:

'This principle has been recognized by all States which have seized ships by right of angary (*qui ont angarié*) during the last war.'[1]

" The Chilean Government never intended to avoid payment of compensation; nor has it disregarded its responsibility to pay for the value of the ships in case they were lost. The defendant says at page 177 of the record: 'The temporary measure of requisition taken by the Chilean Government bound it, according to the precise terms of the Supreme Decrees of requisition, not to prejudice the owners. They suffered no detriment if the ships were returned to them in perfect condition together with the payment of the profits that their use had yielded. In the case of sunken vessels, their price would be assessed as of the time when they should have been returned . . .' All of this agrees with the general principles of law according to which whoever takes a thing from another *in commodatum* is under obligation to return the same thing or pay its value, as Professor Barros Jarpa pointed out in his report at page 4097 of the record. In the case of 'forced loans', the applicability of this principle is stronger.

" The defendant only disagrees about the date [*oportunidad*] on which the value of the sunken vessels must be assessed, and argues that this value is that which the ships had at the time of restitution, *i.e.*, when the war ended. The plaintiffs argue that the value must be that which the ships had in the free market at the time of sinking.

" Once the provisional use of the ships is requisitioned, it is evident that such use ends either because the war that created the state of necessity is over, or earlier, because of the destruction or sinking of the vessels, as happened in the present case. As further use of these vessels is impossible, the obligation, among others, to pay the price of the sunken vessels arises. No argument meriting attention can be offered to the effect that one should wait until the end of the war to solve this problem. On the contrary, to do so would open possibilities of speculation because of the changes in value which the ships would sustain after the war is over. For that reason, the Court at The Hague rightly rejected speculative prices in matters of indemnification. Whiteman makes this point clear when she says that 'as a general rule abnormal conditions, speculative prices, etc., cannot serve as the legal basis for compensation in condemnation awards.'[2]

" The decisions of international tribunals corroborate the soundness of the above principle, holding that in regard to angary what must be determined is the price that the ship had at the moment of its sinking. Several cases are cited in Whiteman's treatise which provide unequivocal evidence of the uniform way in which this

[1] *Op. cit.*, p. 102.

[2] *Op. cit.*, vol. II, p. 917.

question has been answered. The cases decided by the Mixed Claims Commission of the United States and Germany after the First World War are among those cited.[1] The jurisprudence of international tribunals has established, moreover, that compensation for the sunken ship must be assessed according to the just market price. It was so established in the Order of March 11, 1924, of the Mixed Claims Commission in deciding claims based upon the Treaty of Berlin. The Commission said:

> ' Ordered: that in all claims arising under the Treaty of Berlin concerning the destruction of ships, the measure of damages which will ordinarily be applied is the reasonable market value of the property destroyed in the condition which it had at the time and place of destruction.'[2]

In the decision concerning the value of the *Clyde*, Mr. Lushington, one of the Judges, addressing himself to the question of the market value of the ship, said: ' It is an old saying, the worth of a thing is the price it will bring.' According to this principle, the defendant must answer for the price that the three sunken ships would have had in the free market on the date of the sinking.

" The defendant in its brief, which appears at page 175 of the record, considers that it has discharged its obligations by delivering the amount of the insurance policies and the net profits obtained. Textually it says: ' The equitable principle which everybody must respect is that which the Chilean Government has spontaneously respected in surrendering to the shipowners the amount of the insurance policies and the net profits obtained. The State cannot accept the argument that this obligation must be extended.' In another place it adds: ' What is being claimed is not an indemnity as such, but an augmentation of the compensation on the ground that the insurance paid for the sunken vessels was not enough, a fact which cannot be imputed to the State but to a concessionary company. . . .' (*Record*, p. 176).

" In trying to explain its intervention in the purchasing of insurance, the defendant asserts: ' that according to General Order No. 9 of the War Shipping Administration, the Compañía Sud-Americana de Vapores, with the approval of the Chilean Navy and of the Government presented its computation of the amount of the insurance on the Danish ships which were operating under its control. There were only four. The *Lotta* or *Tolten* had already been lost. The War Shipping Administration estimated a progressive insurance at $65 [U.S.] D.W.T., that is per ton of dead weight; $5 [U.S.] for each knot in excess of 82, which permitted an increase to $410 [U.S.] per ton of dead weight. Briefly, a minimum insurance of $75 [U.S.] D.W.T. was estimated, purchased and paid on the Danish ships.

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[1] See the cases of the *Laura Anderson* (cited *ibid.*, vol. II, pp. 1050–1051) and the *Annie F. Colon* (*ibid.*, p. 1050).

[2] *Ibid.*, p. 1043.

As a result of this, the *Selma* or *Elqui* had an insurance of $187,500 [U.S.] while the other three ships were insured for $217,500 [U.S.]. It cannot be argued that the Compañía Sud-Americana de Vapores or the Chilean Government submitted their estimates about the price of the ships in bad faith with the intention of reducing the amount of the insurance.' (Pp. 506 ff. of *Record.*)

"This is the answer that the defendant gives to plaintiff's contention that the Chilean Government was unmindful of anything relating to the insurance and that its amount was determined by the Compañía Sud-Americana de Vapores, which being the debtor for the premiums was interested in keeping the insurance low. (P. 316, ch. XI, *Record.*) Anything relating to the insurance cannot be considered prejudicial to the plaintiffs because they did not intervene in the execution of the respective contracts. On the contrary, the *Record* shows (pp. 209, 219, Clause 10) that when they expressed their views about the insurance to the Government, their communications were rejected. Therefore, they are under no obligation to accept the amount of the insurance as the exclusive and determining measure of the value of the sunken ships. The provisions of Article 1222 of the Commercial Code which presumes that the policyholder, subscribing thereto, recognizes as just the evaluation made therein, is not applicable here. . . .

[The Court then gave details relating to the value of the requisitioned ships, and continued:] "Given the difficulties arising from an effort to achieve a just estimate of the damage and to make good as far as possible the losses suffered by reason of this sort of 'compulsory loan for use' [*préstamos forazados de uso*], international practice, since the last century at least, has authorized the payment of a higher amount than that indicated in the appraisal of the damages. This higher amount has on certain occasions been fixed at as much as 25 per cent. This is the view of Harley, who, after recognizing how difficult it is to choose the right method in order to determine the indemnity, accepts and proclaims the method used by Great Britain since 1871 to which reference has been made.[1] Having regard, however, to the fact that the Danish ships were immobilized at the moment of requisition, as is pointed out . . . below [see *infra*, p. 747], and that they were subject to depreciation, as asserted by witnesses Admiral del Campo (*Record*, p. 802) and Admiral Merino

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[1] Harley says at p. 300 of the previously cited journal: "'The only precedent which furnishes a guide as to a probable method of fixing compensation is that of 1871. From Earl Granville's note of April 24, 1871, we find that the value of the seven British vessels was determined as follows: Lloyd's Association, an expert body on naval affairs, were employed by the British Board of Trade to make an appraisal of the vessels, the assumption being made that they were in good condition at the time of destruction; the Board of Trade considered the circumstances in the case similar to a forced sale and comparable to a case of collision. As was customary, something over the actual value should be allowed the owners, and the Board fixed this at 25 per cent. to be added to the estimate of the expert surveyors.'" This view is corroborated by international jurisprudence cited by Whiteman in vol. II of her study.

Bielich (p. 800), it would not be justifiable to follow the method used by the British Board of Trade, mentioned by Harley, and fix an extra charge [*sobreprecio*] of 25 per cent. on the ships. But this Court considers it equitable to add ten per cent. to the estimate made by the Technical Commission. Therefore, the complaint must be accepted on this point, and the damage estimated as stated above.

" The contention of the defendant that the value of the requisitioned ships should be lowered on the ground that the Bland Law of the United States allowed shipowners to acquire merchant ships for less than half of their price cannot be accepted. Although it is true that the said Law (Law No. 321, passed by Congress on March 8, 1946) authorized the Government of the United States to sell ships at reduced prices, it is also true that this authorization applied only in relation to foreign nations that had lost ships in the war effort of the United Nations. This is not the situation in the present case.

" It appears from the judicial proceedings (*Record*, p. 139) and the parties have agreed (p. 676), that the plaintiffs received from defendant the following amounts of money in dollars which may be applied to the value of the sunken ships:

" For the *Lotta* (ex-*Tolten*)	$445,500.00 [U.S.]
,, ,, *Frida* (ex-*Rapel*)	216,405.07
,, ,, *Helga* (ex-*Choapa*)	288,550.00
Total ..	$950,455.07

The value of the three sunken ships having been fixed at one million, two hundred and forty-three thousand, two hundred and one dollars ($1,243,210.00) and this sum being increased by ten per cent., therefore, compensation for the loss amounts to one million, three hundred and sixty-seven thousand, five hundred and twenty-one dollars ($1,367,521.00). As the plaintiff has received in part payment of this item the amount already indicated of nine hundred and fifty thousand, four hundred and fifty-five dollars and seven cents, there is a balance in his favour of four hundred and seventeen thousand and sixty-five dollars and ninety-six cents. [*sic.* actually 93 cents].

" *Compensation for use.*—The claim of compensation for use is justified not only because of the principle of inviolability of private property but also because of the universal principle of justice which prohibits unjust enrichment. In this litigation compensation for the use which the State made of the requisitioned ships is represented by the sum that the State would have had to pay had it leased ships similar to those which it requisitioned and used. For purposes of compensation use must be reckoned from the date of requisition until the sinking of the *Lotta*, *Frida*, and *Helga*, or until the date when the *Laila* and the *Selma* were returned. . . .

[After considering details of the various rates paid during the war, the Court said:] "With regard to the contradictory evidence which has been presented about rates of affreightment [*precio de las tarifas*] and bearing in mind that in determining the compensation due in cases of angary, in which any situation contrary to the principle enunciated . . . *supra* [p. 741] must be excluded, this Court considers it appropriate to fix the rate of affreightment at two dollars per month per D.W.T. As a result, the following amounts are due: *Lotta*, 88,624.40 dollars; *Frida*, 229,100 dollars; *Helga*, 254,040 dollars; *Laila*, 333,886.66; *Selma*, 287,830.30. The total amount is 1,193,481.30 [actually 1,193,481.36] dollars. The amount of 868,387.54 dollars which was delivered to plaintiffs, as indicated in the document on page 676 [of the *Record*], signed by both parties, and the document on page 139, which appears under the heading 'net balance of exploitation' [*saldo liquido de explotación*], must be subtracted from this total. The balance owed to the plaintiffs for the use of the vessels then amounts to $325,094.30 [U.S.] [actually: $325,094.82].

"*Lucrum cessans*.—Plaintiffs claim as *lucrum cessans* 10 per cent. per annum for the value of each one of the sunken ships, reckoned from the date of sinking until the date when they received the amounts claimed, sums which represent the net profit to the shipowners during this period of time. In rejoinder, defendant avers that this claim is contrary to law because there is no law on which it can be based. In its brief at page 4139, defendant adds that this claim is not justifiable under international law either: 'The *damnum emergens* was suffered by the shipowners because of the loss of the vessels, and it is compensable by payment of the corresponding value; the *lucrum cessans*, *i.e.*, the loss of profits, is represented by the profits which the operation of those vessels yielded. The Government asserts that it is not in default, and that the rule of Article 1537 of the Civil Code is of general character and presupposes in all non-contractual compensation [*indemnización no pactada*] to put the debtor in default.'

"Before analyzing this part of the issue of compensation, it is necessary to determine the meaning of *lucrum cessans* which in the brief of the defendant seems not to have been distinguished from that of *damnum emergens*, which has been defined . . . *supra* [p. 740]. Loss of profit (*lucrum cessans*) is the cessation of profits,[1] *i.e.*, the profits that were not received, and no more. Consequently, in applying these concepts to the question under consideration, it follows that the *damnum emergens*, as noted above, is represented by the loss of the ships and the deprivation of the use thereof by the State exercising angary. *Lucrum cessans*, however, consists of the deprivation of profits during the time which elapsed between the date of the sinking and the date when the State finally pays the claim. Therefore, the lawsuit, as presented, is correct in claiming as *lucrum cessans* not only the value of the use of the ships when they were under the control of the national Government but also compensation for loss of profits after the sinking thereof. Such damages are compensable according to international law, as has been amply demonstrated by Whiteman.[1]

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[1] See Whiteman, *op. cit.*, p. 1838.

" It is not correct, as the defendant states, to maintain that the principles in relation to default established in the Civil Code can be applied, because, as has been demonstrated in the present case, the rules of international law have primacy over those of municipal law. Both international doctrine and international jurisprudence amply justify and recognize compensation for *lucrum cessans*. This is in harmony with the dominant principles of our national legislation (Articles 1556 and 2329 of the Civil Code). Accioly says:

> ' the rule is that with respect to material damages there must be compensation not only for the damage, properly described (*damnum emergens*) but also for what the injured party was prevented from gaining (*lucrum cessans*).'[2]

Le Clère is of the same opinion.[3] Moreover, cases in which international jurisprudence has included *lucrum cessans* in the compensation are cited in Whiteman's treatise.[4]

" It appears from the duly authenticated document on page 4054, executed by Mr. Mortenson, Public Auditor of Denmark, that the following profits were received by plaintiffs during the years following the war, profits which are calculated on the basis of the total amount of insurance: 1945, 19.802%; 1946, 24.934%; 1947, 20.412%; 1948, 15.561%; 1949, 15.970%. Notwithstanding the preceding point, it is proper to bear in mind that the 10 per cent. which is claimed in the suit could be the percentage of profit which corresponds to the exploitation of an establishment working under normal conditions; but this criterion cannot be applied in the present claim because angary is an exceptional proceeding within a régime of exploitation which is also exceptional, and this materially reduces the equitable amount of the profit. On the other hand, the fact that the principle of compensation for *lucrum cessans* has been generally accepted, but that no uniform percentage has been established, shows that each case must be considered on its merits. General Order No. 37 of the War Shipping Administration, the English text of which is not authenticated (p. 699) nor is the translation (p. 691), apart from reference to the 5 per cent. annual depreciation (p. 694), does not contain any information which could be taken into consideration for this purpose.

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[1] " ' Numerous decisions in international cases, including cases arising in tort as well as those arising in contract, have allowed indemnity for damnum emergens and lucrum cessans.' " *Op. cit.*, p. 1838.

[2] *Op. cit.*, vol. I, p. 398, no. 493.

[3] *Op. cit.*, p. 105.

[4] *Op. cit.*, vol. II, pp. 822, 1161, 1162; *ibid.*, vol. III, pp. 1657, 1697, 1709, 1786, 1838.

"Bearing in mind that there are no international precedents fixing the percentage, this Court fixes it at 3 per cent. per annum, reckoning from the date when the ships were sunk until the date when the plaintiff received the amount in part payment [*abono a cuenta*]; and from this latter date, the same percentage shall be applied to the balance due, until the date when this judgment has been executed; it would not be equitable to enforce this rate of interest until payment is made in view of the fact that this judgment orders the payment of 6 per cent. interest for delayed payment . . . [see *infra*, pp. 750–751].

"The defendant arguing against compensation for this item stresses the fact of the immobilization of the ships by reason of the war. It is shown that this immobilization involved expenses, such as that shown in the document on page 484 in which it appears that the sum of $107,365 was paid as wharfage, not to speak of the expense of keeping an idle crew, as well as expenses related to the wear and tear of any ship which is kept in port. In regard to this argument, the defendant submits the following testimony of witnesses (Point 4, p. 62). Don Marcial Mora, then Chilean Ambassador at Washington, declares at page 766 that the ships could not be used by the shipowners because the British navy maintained an effective blockade and threatened to sink any ship which left the Port of Talcahuano. Rear Admiral Vicente Merino Bielich (page 800) declared that he did not know what legal reasons Great Britain had for interfering with the movement of those ships which were flying the Danish flag. He knew only that they were anchored and could not sail. The agents of the shipowners, who had made handsome profits from those ships, resorted without avail to influential people to obtain their departure.

"The Minister Counsellor of the Chilean Embassy at Washington, Mario Rodríguez, in his declaration on page 942 said: 'It is common knowledge that the requisitioned ships were immobilized in the Port of Talcahuano, and that fact is stated also in the Supreme Decrees ordering their requisition.' The Counsellor of the Chilean Embassy in the United States, Mr. Alberto Díaz Alemany (page 829) said that the immobilization of the ships was absolute. It is also common knowledge that ships of Danish registry, after the occupation of Denmark by Germany on April 9, 1940, sailed the high seas on risk of being treated as enemy ships by the British and French navies. That fact compelled them to seek refuge in neutral ports and resulted in their immobilization in those ports.

"The aforementioned testimony leads necessarily to the conclusion that the Danish ships were in fact immobilized. This is in conformity with the text of the resolutions adopted by the Inter-American Economic and Financial Advisory Council (reproduced in paragraph 18 of the decision under appeal) which were adopted because of the problem created by the ships immobilized by war. Thus in Resolution IV (Article 2) about economic co-operation, it was decided to take more effective steps with a view to advancing mutual co-operation and to mitigating the dislocation in commerce of the American Republics due to the war. It was noted that a great deal of the commerce of the American Republics was normally carried on merchant ships of extra-continental Powers and that many of these ships had ceased to be used in commerce because of the increasing destruction of maritime transportation by the belligerents. In another part of this Resolution, there is a statement about the 'prolonged immobilization [*estacionamiento*] of many ships by their owners in American ports', etc.

"The immobilization of the ships has been proved. It is now pertinent to consider the influence that this fact might have in relation to the indemnities which are claimed. Of course this fact has no bearing at all in regard to the value of the sunken vessels because their price was fixed on the bases expressed in para. 142 . . . [of the English translation—here omitted]. Relating the fact of immobilization to *lucrum cessans* is not appropriate because of the conclusions arrived at . . . *supra* [see p. 747]. On the other hand, Agreement 3 (i) of Resolution VI of the first Consultative Meeting of American Foreign Ministers held in Panama in 1939 provided:

> 'The American Republics shall consider as lawful the transfer of the flag of a merchant vessel to that of any American Republic provided that such transfer is made in good faith, without agreement for resale to the vendor, and that it takes place in the waters of an American Republic.'[1]

Resolution XIX of April 26, 1941, of the Inter-American Financial and Economic Advisory Committee at Washington provided in its third recommendation:

> 'That they reaffirm their full right to the free navigation of those vessels, both in their national and international trade, once they are under the flag of any one of the American Republics, and that they agree upon measures tending to facilitate the effective exercise of said right.'[2]

"There were transactions in ships between American States. In this regard, however, the Chilean Government argues that Denmark could not sell her ships to other [countries] because after the recommendation of 1941 of the Advisory Committee in Washington, each American Republic was authorized to requisition them; but the fact remains that a prohibition against selling to any other American

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[1] [General Declaration of Neutrality of the American Republics, *Report* of the Delegate of the United States of America to the Meeting of the Foreign Ministers of the American Republics held at Panama, September 23–October 3, 1939, p. 56.]

[2] [Inter-American Financial and Economic Advisory Committee, *Handbook of Its Organization and Activities*, 1939–1943, p. 59.]

Republic cannot be inferred from this recommendation 'to requisition'. The change of flag was enough to insure that the ship enjoyed the protection referred to in letter (c) of the said recommendation. Moreover, Mr. Alberto Díaz Alemany (p. 829), witness for the Government, agreed that the British Government recognized the transfer of flag.

"Therefore, the fact of the immobilization of the ships is not a sound basis on which to refuse payment for *lucrum cessans*, as the defendant has sought to do. Likewise, the declarations of the witnesses submitted by it, *i.e.*, Alberto Díaz Alemany (p. 829), Jorge Burr (p. 832), and Mario Rodríguez (p. 942), with respect to Item No. 17 of the minute of page 621, do not recognize the existence of any mercantile custom in relation to *lucrum cessans*. These witnesses do not give any satisfactory reason for their assertions; therefore, these declarations cannot constitute full proof; besides they are at variance with international doctrine and jurisprudence which establish precisely the contrary, as has already been demonstrated.

"*Defense of compensation for lucrum cessans.*—The Government of Chile in its reply (p. 177) asserts that it spent ten million pesos in repairs and outfitting the said vessels; but later on in its rejoinder (p. 516), it specifies the said expenditures and affirms that, in the exercise of the right granted by Article 312 of the Code of Civil Procedure, it has amplified its reply and thereby presents the exception of counterclaim to the amount that could be awarded against it. To that effect the Government states that it was compelled to spend in Talcahuano, in order to outfit the Danish ships, the sum of $1,295,836.09 (pesos); and in repairs, the sum of $14,813,282.14 (pesos), according to the documents appearing at pp. 492 and 493–494.

"According to the document on page 492, which lists the expenditures for repairs [outfitting] incurred by the Government from the time of requisition of the ships until the time they were leased to the Compañía Sud-Americana de Vapores, the amount spent was $1,295,836.09 (pesos); but a close look at those outlays would indicate that several of them have no relation to the outfitting of vessels. For instance, the item under the head of insurance—$472,000 (pesos), that corresponding to salaries—$225,000; those for typewriters—$19,788 and $5,147 (pesos). Only the following expenditures relate strictly to the repair [outfitting] of the vessels:

Supplies [*alhajamiento*]	$211,329.09	(pesos)
Repairs and maintenance	127,744.31	,,
Lubricants	618.80	,,
Water	1,350.00	,,
Total	$341,034.20	,,
	[actually: $341,042.20]	

"Regarding the documents presented at pages 493 and 494 of the record, by which it is sought to prove the so-called expenses of repairs amounted to $14,813,484.14 (pesos), it is apparent that they do not suffice to prove the point. First, said documents do not specify the nature of the repairs; they only indicate the names of the vessels, dates of the trips, and total sums spent, without any further information. Although the defendant can provide evidence in proof of the expenditures, this evidence deals only with those outlays which were necessary to outfit the vessels (Item No. 10 of the minute of evidence). This subject was dealt with in the preceding paragraph. What is more, it is proper to observe that those disbursements mentioned in the exhibits of pages 493 and 494 refer to outlays which might have been incurred during the years 1943–1946, that is, when the vessels were leased by the Government to the Compañía Sud-Americana de Vapores and, logically, such outlays would have been borne by the lessee or by the Government, depending on the clauses of the contracts in the drafting of which plaintiffs had no part.

"The amount of $341,034.20 (pesos) converted into dollars at the rate of $31 (pesos) to the dollar (the rate of exchange accepted by the decree which appears at page 139) is equivalent to $10,001.10 (ten thousand and one dollars and ten cents), which amount must be offset against that owed by the Government, as has been previously pointed out.

"*Moratory interests*.—The subject of the second claim is the payment of 6 per cent. interest per annum for the amounts allegedly owing. Among the precedents cited in Whiteman's treatise, plaintiffs invoke a decision of the Court at The Hague regarding claims pressed by Norway for the requisition of certain ships made by the United States, in which the following principle was established:

> 'For the reasons already stated in Chapter IV, the Court is not bound by . . . any other municipal law, in so far as these provisions restrict the right of the claimants to receive immediate and full compensation, with interest from the day on which the compensation should have been fully paid *ex aequo et bono*. The Court is competent to allow interest as part of the compensation *ex aequo et bono*, if the circumstances seem to justify it.'[1]

But as can be easily seen from the very principle which is adduced, it appears that the justification for awarding interest is subject to the fulfillment of certain circumstances which, naturally, only relate to the reasons for the delay.

"Moratory interest is awarded as compensation for damage caused by the fact of the delay in payment, a delay which occurs between the date on which the obligation should have been discharged and the date on which it is actually discharged. In the

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[[1] *Norwegian Shipowners' Claims* (*United States* v. *Norway*): *R.I.A.A.*, vol. I., pp. 340, 341.]

present case, the obligation to compensate has been *sub lite* from the moment when the service of the complaint was made until the date when final judgment is made as to whether defendant must pay compensation or not, and, in the event that there is such a duty, what the amount should be. As a consequence of the foregoing, the obligation of the defendant to pay exists from the moment the decision establishing it is final, and not before, as has been stated in the complaint. Nobody can be in default of the discharge of an obligation the limits of which have not yet been determined.

"The claim for 6 per cent. interest, which is in accordance with international practice, must be admitted, but on condition of reckoning the amount from the moment when the award is [made] final.

"*Compensation for the value of fuel, provisions, and spare stores. Outlays on account of salaries.*—Plaintiffs also claim: (a) compensation for the value of fuel, supplies, and spare stores belonging to each of the sunken vessels (Annex A of the complaint), *i.e.*, 12,255 dollars for the *Lotta*; 8,783 dollars for the *Frida*; 11,277 dollars for the *Helga* (Point No. 4 of the reply); (b) for disbursements on account of salaries and expenses of the masters, officers, and crews of the five vessels; and, in both cases, interest as stated in the respective annexes of the complaint (Annex B).

"In regard to the compensation for fuel, supplies and spare stores, it must be concluded that they formed an integral part of the value of the ships. This is inferred from the appraisals which appear at pages 617 ff., and from what was stated by witness Schaefer (p. 2290). This is a logical conclusion if one considers that every ship is supposed to have a minimum of accessories and supplies indispensable for navigation, and the spare stores necessary to meet any dangerous situation. It has not been proved that the vessels had any extra supplies when they were requisitioned; and it is not possible to assume this possibility in regard to the ships which were anchored in Talcahuano Bay and which came from a neutral country.

"It is true, as a general principle, that such damage must be compensated, so it is logical that this view be taken in regard to spare stores in a situation in which a ship is to be returned and where the equipment and spare stores have been put to abnormal use, as Le Clère has pointed out.[1] This is not true, however, where it is necessary to answer for a whole ship which has been lost, as in the instant case, where this equipment necessary to navigation is included in the value of the ship.

"On the other hand, it must be borne in mind that there is no evidence to prove the existence and amount of these damages. In effect, when the expert witness, Mr. Oyanedel, was requested to give an opinion with reference to items (c), (d), and (e) of the brief, which appear at page 531, he said in his report (p. 4128): 'In the absence of essential information in the record, I cannot report to the Honorable Court with respect to the items mentioned.' The minutes at pages 263 ff., 277 ff., and 288 ff., presented by plaintiffs have no probatory value because they were not authenticated.

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[1] *Op. cit.*, p. 101.

" In respect to the disbursements for salaries, plaintiffs claim the amount of 253,180 dollars. If it is true that according to Article 5 of the Decree which authorized the requisition of the ships, the Government of Chile bound itself to pay to the crew, as long as they stayed in Chile, a monthly stipend for maintenance, proportionate to their status on the ships, or remuneration of a previously agreed amount if they continued to serve on the ships, it is a fact that no officer or crewman exercised this right of option. The right they have to appear as parties in the claim is evident, as is pointed out by Le Clère.[1]

" The evidence adduced by plaintiffs does not support either of the outlays which they claim to have made. In effect, the document introduced at page 4224 of the record, which alludes to the salaries earned by the crew, refers to amounts earned before the requisition; the documents at pages 546 ff., constitute general accounts of payrolls and other expenses. The names of the persons receiving these amounts are not listed, nor do these exhibits indicate the time during which these people worked nor the type of work they performed. The Government of Chile has not disavowed this obligation during the present proceeding, as evidenced by the documents at pages 206 and 244. It is impossible, however, to estimate those expenses for want of evidence and especially on analysis of the depositions of the witnesses submitted by the defendant. . . .

" Under these circumstances and in accordance with the preceding discussion, this action must be dismissed. . . .

" *Legal basis for payment in dollars.*—The plaintiffs argued that the nature and amount of damages should be estimated in dollars and that they should be paid a fixed amount in this currency in settlement of their claims. The defendant in reply left no doubt as to the currency, implicitly accepting the principle of dollar currency, as the complaint included the point that the dollars accredited to the State were sufficient to cover the amount of damages involved. Nevertheless, in the rejoinder, recovery in dollars was alleged to be illegal.

" In the said brief, it was argued that in a proceeding concerning a claim for damages only national currency might be used, according to Article 1 of Decree-Law No. 606 and Law No. 5107. Neither the said Article 1 of Decree-Law No. 606 which simply provides that ' the monetary unit in Chile is the peso ', nor the provisions of Law No. 5107, which governs, in general, international exchange operations and, in particular, payment of contractual charges [*precios*], constitutes a barrier to recovery in dollars in this case. On the contrary, there are definite reasons for recovery in North American currency.

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[1] *Op. cit.*, p. 102.

" Actually, the defendant in the brief replying to the complaint, recognized the fact that part of the indemnity has already been paid in dollars, thereby admitting its willingness to accept this form of payment. This is evidenced by Decree No. 745 of April 22, 1946 (p. 139), by which the Chilean Government ordered a certain amount in dollars to be delivered to the Lauritzen Company as partial payment of the indemnity. Besides this, the Government ordered the amount of 214,463 pesos, which had been received by it from use of the ships, to be converted into dollars (at the rate of 31 Chilean pesos to the dollar) for the purpose of paying in dollars the sum which it owed.

" During the proceedings both parties have discussed prices in terms of dollars in order to estimate the different kinds of damage which are the subject of the present litigation. For example, the dollar has been used in assessing the cost of construction of the ships, of their use, of the rates [of affreightment] per D.W.T., of the profits of the ships before and after requisition. The Government itself made the contract for the lease of the ships to the Compañía Sud-Americana de Vapores in terms of dollars (pp. 174 ff., 204, 221). Furthermore, it has been international practice since the last war to pay compensation due by reason of requisition in dollars. The numerous cases cited in Whiteman's treatise corroborate this assertion. Moreover, it must be observed that the said currency is used as an international medium of exchange, which is evident in Article IV (1) (a) of the International Monetary Fund,[1] which Chile ratified by Law No. 8403 of December 29, 1945. This Article provides that the par value of the currency of each member shall be expressed in terms of gold as a common denominator or in terms of the United States dollar.

" The lack of merit of the exceptions under consideration is more evident if one bears in mind the fact that it would be neither just nor equitable to dismiss a lawsuit in which all court proceedings have been complied with and the parties have incurred heavy expenditures, for the sole reason that one party preferred payment in a specific currency which has universal exchange value rather than in a depreciated currency which is not a circulating medium beyond the national frontiers.

" It should be noted also that, even if it were possible to order payment in national currency, the realization of the amount claimed would be rendered difficult. In the event that plaintiffs wished to reconstruct their vessels (payment of compensation must comprehend this possibility), they could not do so with Chilean currency because, unlike the dollar, it is not accepted by foreign shipyards as

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[[1] United Nations Monetary and Financial Conference, Bretton Woods, *Final Act and Related Documents*, Washington, Government Printing Office, 1944, p. 31.]

a circulating medium. This would raise the problem of the convertibility of the national currency into foreign currency. The plaintiffs would then be subject to the possibility of receiving an uncertain amount which would mean that they would not realize full compensation from their claim.

" Finally, it would be impossible for this Court to declare that the payment of damages must be made in Chilean pesos, if it is remembered that the *litis contestatio* was fixed when plaintiffs requested payment in dollars. Their complaint cannot be changed without risking an *ultra petita* decision. This is also recognized by the defendant, for in relying on this contingency it requested not payment in national currency but rather rejection of the complaint."

[Report: *Revista de Derecho, Jurisprudencia y Ciencias Sociales y Gaceta de los Tribunales*, vol. 52, Nos. 9 and 10 (November–December 1955), p. 444.[1]]

vii.—Trading with the Enemy

Trading with the Enemy—Trading with Inhabitants of Occupied Territory—Intercourse and Trade between Burma under Japanese Occupation and India.

RAMASWAMY IYENGAR *v.* VELAYUDHAN CHETTIAR.

Burma, Supreme Court. October 24, 1951.

(Sir Ba U C.J., E Maung and On Pe JJ.)

THE FACTS (as stated by the Court).—" The appellants (Receivers in India) appointed one Arunachalam as agent to continue to carry on money lending business in Rangoon. War broke out and Burma was occupied by the Japanese. During the occupation the respondent paid in Japanese currency his debt to the agent. . . . The appellants contended that the contract of agency came to an end by operation of law and the agent had no authority to accept the amount."

Held: that the appeal must be dismissed. Intercourse and trade between persons in Burma under Japanese occupation and persons living in India was not illegal.

The Court said: " The present case must . . . be decided according to the law of this country. International law is a law that deals with the question of relations between States and not between individuals as in this case. The law of this country applicable to this case is to be found in the Defence of Burma Act . . . and the Contract Act. . . . As intercourse between a person living in enemy occupied Burma and a person living in India was not prohibited by the Defence of Burma Act, the contract of agency . . . would not become illegal under the said Act when Burma fell under the occupation of the enmey. If the contract of agency was to become illegal it would become illegal under Section 23 of the Contract Act (as [being] opposed to public policy). . . . Now what is meant by public policy? It is defined nowhere. It is a loose term and so it is used in such a way as to serve the interests of one's own country. This is best illustrated by the different policies followed by England and other countries which have adopted the British system of jurisprudence and continental countries of Europe in dealing with the question of [the] effect of war on contract.

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[1] A full translation of the Report is deposited in the Library of the Peace Palace at The Hague, and in the Squire Law Library of the University of Cambridge.

" The classical exposition of the principle followed by England . . . is to be found in the *Ertel Bieber* case ([1918] A.C. 260), where Lord Dunedin said:

> ' From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relations between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of war or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law.'

" Accordingly, in all the cases cited at the bar what is found is that a contract entered into between a British subject or anybody living in England and a subject of the enemy State or a person living in the enemy State or enemy occupied country becomes abrogated on the outbreak of war.

" On the other hand, the principle followed by Germany, Austria-Hungary, Holland and Italy, at least before the First World War, was to allow intercourse and trade between persons residing in those countries and persons residing in enemy countries even after the outbreak of the war unless it was prohibited by special enactment, the reason being that it would be in their interest to allow it. See *Oppenheim's International Law*, Vol. II (5th ed.), p. 263.

" Now was it in the interest of this country that there should be no trade and no intercourse between persons residing in this country after its occupation by the Japanese and persons living in India? The answer must be in the negative. By allowing intercourse and trade if possible . . . the interests of this country would not only not be injured but on the contrary be promoted in that it would afford greater and better facilities and opportunities for the liberation of this country. Therefore looking at the question purely from the interest of this country, and the interest of the country only must be taken into account, intercourse and trade between persons living in this country even after its occupation by the enemy and persons living in India must be held not to be opposed to public policy as laid down in Section 23 of the Contract Act.

"It therefore follows that the contract of agency [in question did not become abrogated. . . ."

[Report: 1952 B.L.R. S.C. 25.]

VI.—Enemy Character

i.—Of Individuals

Enemy Character—Of Individuals—National of Co-belligerent—Enemy Agent—Termination of Activity as Enemy Agent—Vesting of Property Thereafter—The Law of the United States of America.

HANSEN *v.* BROWNELL.

United States, District Court, District of Columbia. May 23, 1955.

Court of Appeals, District of Columbia Circuit. May 10, 1956.

THE FACTS.—Hansen, the plaintiff in this action, had resided in Germany from 1939 to 1948. During the years of active hostilities he was engaged in English-language propaganda work as an employee of Rundfunk, the radio monopoly of the German Government, under the Ministry of Propaganda and the Foreign Office. On June 26, 1951, the Attorney-General vested certain of his property as enemy owned under the provisions of the Trading With the Enemy Act (40 Stat. 411, as amended, 50 U.S.C. App. §§ 1 *et seq.*). At that time, Hansen was living in Paris; he was regarded by the French Government as a British subject, and carried a British passport. He sued to recover the property.

Held (by the District Court): that judgment must be rendered for the defendant. Since the plaintiff had voluntarily engaged in propaganda activities on behalf of an enemy Government, he possessed enemy character as an "agent" of a Government with which the United States was at war, within the meaning of the Trading With the Enemy Act. So long as the war continued, he could not shake off his enemy character by moving to another country. [Report: 132 F.Supp. 47; further proceedings, turning wholly on issues of United States law, reported at 135 F.Supp. 117.]

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. The plaintiff acquired his enemy character by engaging in propaganda activities as an agent of the German Reich. A person remained an enemy agent until the end of the war, even though the conduct which brought about the relationship of agency might have ceased before the vesting of the property of that person.

The Court said: "As pointed out by Judge McGuire, Hansen had resided in Germany from July, 1939, until some time in April, 1948, this period including of course the years of actual hostilities, and had taken an active part in the furtherance of the German war effort by propaganda work, utilizing his mastery of the English language.[1]

" It is the latter factual situation upon which our own decision turns. Assuming, *arguendo*, that the property was owned by Hansen, and that the fact that he resided in France on June 26, 1951, precluded classifying him an enemy under section 2 (a) of the Act on the basis of residence in an enemy country, nevertheless his propaganda employment and activities for Germany during the war made him an enemy under section 2 (b) as an agent of a government with which the United States was at war. Cessation of his employment and agency activities prior to the vesting order did not render section 2 (b) inapplicable. We hold that a person who becomes an enemy agent during the war is an enemy within the meaning of the Act until the end of the war, though the conduct which brought about the agency relationship ceases before the vesting of such person's property. *Sarthou* v. *Clark*, D.C.S.D.Cal., 78 F.Supp. 139.[2] There is nothing in the language of the Act which militates against this construction, and to hold otherwise would be inconsistent with the purposes and intent of the Act to reach assets of one who has acted for the enemy, and to make them available to assist in meeting the costs of war. See *Propper* v. *Clark*, 337 U.S. 472, 484, 69 S.Ct. 1333, 93 L.Ed. 1480. Hansen was an agent of the German Government until the end of the war insofar as the vesting powers of the Act are concerned, and this enemy character also disqualified him to sue under section 9. We add that we agree with the findings of Judge McGuire that the employment of Hansen by the enemy was not involuntary on his part in any sense affecting this litigation."

[Report: 234 F.2d 60.]

NOTE.—In *Abrikossoff et Al.* v. *Brownell et Al.*, 145 F.Supp. 18 (D.D.C. 1956), a White Russian resident in Tokyo from 1925 to 1946 was held to have been an " enemy " until 1946 by reason of his having been " resident within the territory " of Japan, an enemy State, notwithstanding his intention to migrate to the United States, his attempt to leave Japan in 1942, and his ultimate entry into the United States in 1946.

In *Oehmichen* v. *Brownell*, 24 U.S. Law Week 2497 (D.D.C. 1956), it was held that German aliens interned in the United States who had sought and obtained temporary repatriation to Germany in order to free themselves from duress by pro-Nazi elements in the internment camp, did not by their repatriation become " resident within " enemy territory and were not enemies under the Trading With the Enemy Act.

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[1] He became an employee of the Rundfunk, which was the German Government's radio monopoly under the Ministry of Propaganda and the Foreign Office.

[[2] See *Annual Digest*, 1948, Case No. 146.]

Enemy Character—Of Individuals—Dispossession in Country of Residence—Inter-Allied Declaration of January 5, 1943—Invalidation of Acts of Dispossession—Persons Affected by Declaration —Jews of Roumanian Nationality Resident in France during Second World War—The Law of France.

COHEN-KLARSFELD *v.* POUCHARD-STOPT.

France, Court of Cassation. November 20, 1956.

THE FACTS.—The Inter-Allied Declaration of January 5, 1943, against Acts of Dispossession in Territories under Enemy Occupation or Control, to which the French National Committee subscribed, reserved the right of the Signatories to declare invalid any acts of dispossession carried out in territories under, *inter alia*, German control during the Second World War. The appellants were the successors in title of one S., a Jew of Roumanian nationality, whose business in Paris was acquired by the respondents in 1940. They contended that the transaction between S. and the respondents constituted an act of dispossession within the meaning of the Inter-Allied Declaration and the French Ordinances of November 12, 1943, and April 21, 1945, enacted in pursuance thereof, and that they were accordingly entitled to a return of the business previously owned by S. They further contended that as France and Roumania had never been at war, S. could not have been an enemy subject—enemy subjects being excluded from the benefits of the Declaration and the two Ordinances. The respondents contended that S. had been an enemy subject, notwithstanding that no state of war had ever existed between France and Roumania, and that as an enemy subject he was not entitled to the benefits of the Declaration or the Ordinances, with the result that the appellants could not claim such benefits.

Held: that the contention of the respondents must be upheld and the appeal dismissed; notwithstanding the absence of a state of war between France and Roumania, S. had been an enemy subject, and the benefits of the Inter-Allied Declaration and the French Ordinances of 1943 and 1945 could accordingly not be claimed by his successors in title.

The Court said: " The judgment under appeal dismissed the action on the ground that S., a national of an enemy Power, could not rely on the benefit of this provision (Article 11 of the Ordinance of April 21, 1945). The notice of appeal contends that as the Court of Appeal held that no state of war existed between France and Roumania, S. was entitled, as a Roumanian citizen, to benefit from the provisions of the Ordinance. The judgment of the Court of Appeal states that the Ordinance of April 21, 1945, enacted while hostilities were still in progress, derives from the Ordinance of November 12, 1943, designed to put into operation the solemn

Declaration of the United Nations of January 5, 1943, which was intended to put a stop to the measures of expropriation taken by the Governments with which those nations were at war. Enemy subjects were not among the persons protected by this Declaration and are therefore excluded from the benefit of the Ordinance of April 21, 1945. As Roumania is one of the countries covered by the Declaration of the United Nations, it matters not—as the Court of Appeal rightly points out—that an actual state of war did not exist between France and Roumania. The judgment under appeal has correctly applied the provisions referred to in the notice of appeal, regarding S. as an enemy subject and as such excluded from the benefit of the Ordinance of April 21, 1945, which was enacted by reason of an Agreement signed with the Allied Governments and whose scope is limited by the latter. For these reasons the appeal is dismissed."

[Report: *Gazette du Palais*, March 20–22, 1957.]

VIII.—Enforcement of the Laws of War

ii.—Punishment of War Crimes and Crimes against Humanity. Defence of Superior Orders

Laws of War—War Crimes—Espionage and Sabotage—Lawful and Unlawful Combatants—Unlawful Belligerency against State of which Individual a National—The Law of the United States of America.

COLEPAUGH *v.* LOONEY.

United States, Court of Appeals, Tenth Circuit. July 13, 1956.

THE FACTS.—This was a petition for habeas corpus to challenge the legality of petitioner's confinement in a United States federal penitentiary under sentence of a United States military commission.

During November 1944, the petitioner, a United States citizen, and another person were landed in the United States from a German submarine in order to commit espionage, sabotage, and other hostile acts in the interests of the German Reich. The military commission which tried the petitioner was convened pursuant to an Executive Military Order of the President of the United States, issued on January 11, 1945 (10 Fed. Reg. 549). The petitioner was charged with violation of the law of war in that he had secretly passed in civilian dress through the military lines of the United States for the purpose of committing espionage and sabotage for the enemy, had appeared and remained behind the lines for such purpose, and had acted as a spy for the enemy in time of war. The petitioner was convicted by the military commission, and the conviction and sentence were affirmed on review. In the present proceedings, the petitioner contended that his confinement was unlawful because, under the Constitution of the United States, he had a right as a citizen of the United States to be tried by a civil court before a jury and with the assistance of counsel, and the Commission therefore lacked jurisdiction to try him. The United States District Court of Kansas discharged the writ and the petitioner appealed.

On appeal,

Held: that the judgment of the District Court must be affirmed. Under the law of war, a form of international common law applied by the courts of the United States, those who passed surreptitiously from enemy territory into the territory of the other belligerent, discarding their uniforms upon entry, for the commission of hostile acts had the status of unlawful combatants punishable as such by a military commission. The United States citizenship of the petitioner did not deprive a military commission of jurisdiction over him or confer upon him any constitutional rights not accorded to any other belligerent under the law of war.

The Court said: " There is certainly nothing in the proclamation to preclude access to the courts for determining the applicability of the law of war to a particular case. Indeed, the Proclamation could not foreclose judicial consideration of the cause of restraint, for to do so would deny the supremacy of the Constitution and the rule of law under it as construed and expounded in the duly constituted courts of the land. In sum, it would subvert the rule of law to the rule of man. See *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 1, 2, 87 L.Ed. 3;[1] *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281; *In re Yamashita*, 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499.[2] The courts have, however, traditionally recognized a body of international common law known as the law of war, and surely since *Ex parte Quirin, supra*, there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war, and to establish military commissions with jurisdiction to try all persons charged with defined violations.

" In the application of the law of war to various offenses thereunder, both the executive and judicial branches of the government have recognized a clear distinction between a lawful combatant subject to capture and detention as a prisoner of war, and an unlawful combatant, also subject to capture and detention, but in addition ' subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.' *I.e., Ex parte Quirin, supra*, 317 U.S. at page 31, 63 S.Ct. at page 12. And, both the judicial and the executive authorities have recognized that 'those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission.' *Id.*, 317 U.S. at page 35, 63 S.Ct. at page 14.

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[1] See *Annual Digest*, 1941–1942, Case No. 168.]

[2] *Ibid.*, 1946, Case No. 115.]

"Judged by this concept of common law military justice, the charges and specifications before us clearly state an offense of unlawful belligerency, contrary to the established and judicially recognized law of war—an offense within the jurisdiction of the duly constituted Military Commission with power to try, decide and condemn. And, the petitioner's citizenship in the United States does not divest the Commission of jurisdiction over him, or confer upon him any constitutional rights not accorded any other belligerent under the laws of war. See *Ex parte Quirin, supra*, 317 U.S. at page 37, 63 S.Ct. at page 15.

"With this, judicial inquiry should end. But, the petitioner earnestly insists that he could not have been an unlawful belligerent, subject to the Military Commission, because he did not pass through military and naval lines of the United States for the purpose of committing hostile acts. Of course this contention involves a matter of fact directly bearing upon his guilt or innocence, now within the scope of this inquiry. In any event, however, the undisputed facts are that petitioner secretly landed on the Coast of Maine from a German submarine, and entered the United States after having shed his military dress. He was carrying concealed side arms, forged credentials and other paraphernalia useful in his assigned mission of espionage. To say that landing on our shores in time of war from an enemy submarine was not passing through the naval and military lines is to say that our coastal waters and shores at the point of entry were undefended—an assumption directly contrary to the agreed facts.

"Petitioner also argues that he could not have the status of an unlawful belligerent at the time he crossed our borders because, although he left the United States as an American citizen and traveled to Germany for hostile purposes, he recanted after arrival in the camp of the enemy, and thenceforth resolved to aid his country by exposing the mission which brought him back to his native land. It seems unnecessary to say that his intent is not on trial in this collateral proceeding. Conceding that his status upon reentry into the United States determines military jurisdiction over him as an unlawful combatant, it also is determinative of guilt or innocence, and the Commission is not deprived of jurisdiction because the factum of guilt also determines jurisdiction."

(The Court then disposed of a further contention of the petitioner under the municipal law of the United States.)

[Reports: 235 F.2d 429; *certiorari* denied, 352 U.S. 1014, 1 L.Ed. 2d 560, 77 Sup. Ct. 568 (1957).]

IX.—Prisoners of War

Prisoners of War—Duty of Obedience—Relationship to Unauthorized Communication with Enemy—Geneva Prisoners of War Convention, 1949—The Law of the United States of America—Offer of Amnesty by Representative of United Nations—Whether Binding on the United States.

UNITED STATES *v.* BACHELOR.

United States, Court of Military Appeals. September 7, 1956.

THE FACTS.—The accused, a soldier of the United States Army, was charged with violation of the United States Uniform Code of Military Justice, Articles 104 (unauthorized correspondence, communication and intercourse with the enemy), 105 (misconduct as a prisoner), and 134 (disorders and neglects to the prejudice of good order and discipline). The offences occurred while Corporal Bachelor was a prisoner of the Chinese Communist Forces during the Korean conflict. While a prisoner, he had informed on his fellow prisoners in order to obtain preferential treatment and had aided the enemy's activities of indoctrination and propaganda by developing and disseminating false information. Prior to his release from confinement, the accused and other prisoners were urged by an officer of the United Nations Command to seek repatriation.

Corporal Bachelor was found guilty by a court-martial, and the findings of fact and the sentence, as modified by the reviewing authority, were affirmed by an Army board of review (CM 377832, 19 C.M.R. 452 (1955)). The accused appealed to the Court of Military Appeals, contending, *inter alia*, that the United Nations officer had extended an offer of amnesty which precluded prosecution, and that, since the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (6 U.S.T. 3317, *T.I.A.S.* No. 3364, *U.N.T.S.*, vol. 75, p. 135) authorized communication by a prisoner with his captors regarding intellectual diversions and as spokesman for his fellow prisoners concerning the conditions of captivity, the trial Court erred in instructing that his actions were not as a matter of law authorized conduct.

On appeal,

Held: that the decision of the board of review must be affirmed. After disposing of several issues of municipal law, the Court held that the statements made by the officer of the United Nations Command did not constitute an offer of amnesty, and that in any event the President of the United States would not be bound by a statement made in the name of the United Nations. Although the

Geneva Prisoners of War Convention authorizes communication with the enemy for limited purposes in exceptional circumstances, the acts with which the accused was charged were not within the terms of that Convention.

The Court said: "Amnesty has been defined as an act of the sovereign power granting oblivion or a general pardon for a past offense, and is rarely exercised in favor of single individuals, but is usually exercised in behalf of certain classes of persons who are subject to trial but have not yet been convicted. [Citations omitted.] So far as the Federal system is concerned, the Constitution of the United States grants a general pardon power to the President and no one else, and it is clear enough that this pardon power includes the power of amnesty. U.S. Constitution, Article 2, § 2, Clause 1; *Ex parte Garland*, 4 Wall. 333, 18 L.ed. 566 (1866).

"It is the general rule that this pardon power is nondelegable and cannot be shared with another person or official when the power is granted in terms similar to those used in our Constitution. 67 CJS, Pardons, § 3b. Furthermore, the Manual for Courts-Martial, United States, 1951, paragraph 68*e*, speaks of the defense of pardon as being 'an act of the President.' Thus we have no reason to suppose that the power to grant an amnesty with respect to offenses against the laws of the United States can be delegated. Admittedly, Congress is not precluded from enacting amnesty statutes, *Brown* v. *Walker*, 161 U.S. 591, 16 S. Ct. 644, 40 L. ed. 819 (1896), but this exception is not at all pertinent here for it certainly has not acted. Thus, we are limited to the question of Presidential action, and there is nothing in this case to indicate that the communication itself was ever authorized by the Chief Executive of the United States or that he meant to offer an amnesty of any sort to the accused and those of his class. Indeed, the evidence is quite to the contrary. The text of this broadcast was formulated within the explainer group and based in large part on information which the group learned from Corporal Dickenson upon his return to American military control. Its draftsmen were not authorized, and did not intend, to offer any sort of amnesty or pardon with respect to offenses committed by prisoners of war prior to the general exchange of prisoners. Furthermore, Major Moorer was speaking in the name of the United Nations and not in the name of the United States when he made this broadcast. The broadcast itself was aimed at British and South Korean non-repatriates, as well as Americans. Therefore, it cannot be said that this broadcast was authorized by, or became an act of, the President.

"If it is assumed for the purpose of argument that Major Moorer was speaking on behalf of the President of the United States, it still does not follow that the broadcast included a grant of amnesty. It is well settled that no technical words or terms are necessary to constitute a pardon or amnesty, but this instrument does not possess any of the requisite attributes. . . .

" The accused had testified that he believed he was authorized to do many of the specific acts alleged as unlawful communication, because other prisoners, including some commissioned officers, also took part in making speeches, circulating peace petitions, and otherwise assisted the enemy. Defense counsel had placed in evidence certain portions of the Geneva Convention relating to prisoners of war which authorize prisoners to communicate with their captors concerning ' intellectual diversions ' or as agents of fellow-prisoners in regard to the conditions of their incarceration. Counsel then requested instructions on these subjects. The law officer first ruled that, as a matter of law, the Geneva Convention did not authorize communications such as concerns us in this instance. This, we hold, was proper, for it is the function of the law officer, and not the fact finders, to place a construction on a statute or treaty where no question of fact is raised. 53 Am Jur, Trial, § 253. The law officer informed the court-martial that, in general, prisoners of war were forbidden to communicate with their captors for any reason, but that the sovereign had granted certain exceptions to this rule, only some of which were to be found in the Geneva Convention, and that the acts alleged here, if found, would not be within any of the Convention's exceptions. He had earlier told the court that they must find, beyond a reasonable doubt, that the accused had acted without proper authority. Therefore, the law officer contented himself with merely adding a full instruction on the defense of mistake of fact to what had gone before. This, we think, was enough."

(The Court then disposed of the remaining contentions of the accused under the law of the United States.)

[Reports: 7 U.S.C.M.A. 354; 22 C.M.R. 144.]

War—Prisoners of War—Offence against Military Law of Prisoner's Home Country—Offence Committed during Captivity in Territory of Detaining Power—Whether Courts of Home Country Competent to Exercise Jurisdiction after Prisoner's Release—The Law of Italy.

Re TASSOLI.

Italy, Court of Cassation (United Chambers). January 28, 1956.

THE FACTS.—The appellant, a member of the Italian armed forces, was convicted of insubordination within the meaning of the Italian Military Penal Code. The offence had been committed against another Italian prisoner of war while the appellant himself was a prisoner of war in the custody of a foreign Power. On appeal, it was contended that the Italian military tribunal which had tried the offence was not competent to do so, on the ground that such exercise of jurisdiction would be tantamount to recognizing the extraterritorial operation of Italian criminal law and would violate an alleged rule of international law that there was no " hierarchy of ranks " between prisoners of war.

Held: that the appeal must be dismissed. Members of the Italian armed forces carried their military law with them and were therefore punishable by Italian military tribunals for offences committed during captivity in violation of Italian military law.

The Court said: " The premise on which the defence of the appellant is based is manifestly wrong. He says that by the standards of the law in force there cannot be any degree of subordination of prisoners of war of one rank to prisoners of war of another rank. He says that to acknowledge a hierarchy of ranks between prisoners of war would be tantamount to recognition of the exercise of authority by the State to which the prisoners belong, whereas, in accordance with the relevant international Conventions governing this matter, prisoners are subject only to the captor State. He relies in support of this contention on the old jurisprudence of the Supreme Military Tribunal, which goes back to the years 1916 and 1917 and which did not recognize the existence of hierarchical links between prisoners of war, and accordingly denied the existence of the offence of insubordination as between prisoners. The following considerations disprove these arguments: According to the law of war prisoners of war are subject to the penal and other laws of the State which has captured them. These laws apply to all those who are within the territorial boundaries of the State. Indeed, the right to apply criminal sanctions to prisoners of war cannot be doubted because it forms part of the sovereign rights of every State and constitutes a form of application of the general rule of territorial criminal jurisdiction. Article 8 of the Hague Convention of 1899 reflects this concept and provides as follows:

> ' Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in the power of which they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.'

Another rule is closely connected with the above-mentioned rule of international law concerning the territorial character of criminal law applicable to prisoners of war belonging to the army of the enemy and which is expressly laid down in the military penal code. That rule is also a rule of international law. It recognizes the personal character of military penal law (a concept laid down in specific terms in Article 1 of the Military Penal Code and designed to ensure the performance of duties inherent in military status) and provides that the armed forces of the State take their laws with them. This rule justifies the application of national criminal law to Italian prisoners of war in the custody of enemy forces. Such application was already contained in the old Codes (Article 3 of the Army Code and Article 2 of the Naval Code) by way of interpretation, and it is now expressly provided for in the Military Penal Code. This Code lays down the basic principle of the extra-territorial application of military penal law and reaffirms, by means of a general provision, that members of the Italian armed forces are subject to the penalties laid down in the Military Penal Code in respect of offences committed during captivity."

[Report: *Rivista di Diritto internazionale*, 39 (1956), p. 595.]

War—Prisoners of War—Escaped Prisoners of War—Status in Neutral Territory.

See p. 609 (*Stepczynski* v. *Secretary-General of the United Nations*).

XI.—Non-Hostile Relations between Belligerents, Especially Armistices

War—Non-hostile Relations between Belligerents—Capitulation—Terms of Treaty of Surrender—Provision for Surrender of Property—Effect on Legal Title.

De Deckere *v.* Belgian State.

Belgium, Court of Cassation. November 9, 1956.

The Facts.—In the spring of 1940 the appellant was entrusted with some material which formed part of the stock of the Belgian army for the purpose of manufacturing uniforms. After the war the Belgian State sought to recover that material. The appellant denied the title of the Belgian State to the property in question by reference to the Protocol of Surrender between Belgium and Germany signed on May 28, 1940, which provided that " all stocks for the provisioning of the Belgian army shall be handed over intact to the German authorities ". The Court of first instance and the Court of Appeal of Ghent held that the Belgian State had not thereby lost title in the property; that title would have passed only when the Occupying Power in fact claimed the property in question; and that there was no evidence that the Occupant had ever so claimed the property (see *International Law Reports*, 1955, p. 930). This was a further appeal. It was contended on behalf of the appellant that the contested material had become the property of the German authorities by virtue of the mere signature of the Protocol of Surrender, in conformity with Article 1138 of the Belgian Civil Code which provides that the obligation to deliver is perfect as soon as the contracting parties agree, and makes the creditor the owner of the property to be delivered.

Held: that the appeal must be dismissed. The Protocol of Surrender did not lay upon manufacturers who had received material belonging to the Belgian army a personal obligation to surrender it to the German army, nor did the Belgian army undertake to surrender such material. The Protocol did not constitute a contract governed by Article 1138 of the Civil Code.

The Court said: " It is true that, in interpreting Article 5 of the Annex to the Protocol of Surrender, the judgment of the Court of Appeal points out that in virtue of that provision and of Article 35 of the Annex to the Hague Convention of October 18, 1907 [the Hague Regulations] the Belgian State was bound to deliver up the goods referred to in Article 5, and that the two parties were bound scrupulously to observe the provisions of the Protocol. However, the judgment does not hold that a private individual, such as the appellant, to whom material had been entrusted before military operations began for the purpose of the manufacture of uniforms, was bound by virtue of the aforesaid Article 5 to surrender to the enemy such quantities of the material as remained in his possession on May 28, 1940. Further, the judgment does not find that the Belgian State or army undertook to surrender such goods to the German army, nor does it appear from the judgment that the Court decided expressly or by implication that the goods in question constituted ' depots ' administered by the army, or ' stocks stored for the provisioning of the army ' in the meaning of Article 5 of Annex II of the Protocol of [Surrender]. Article 5 of Annex II of the Protocol does not provide that manufacturers who received material from the Belgian army in the circumstances described above were personally bound to surrender the material to the German army, or that the Belgian army had undertaken so to surrender it.

" The judgment of the Court below points out that the armistice agreement is military in nature, and is imposed by the will of the conqueror, but it is nevertheless binding on the State and must be observed by it. It points out, further, that a protocol of surrender cannot be assimilated to the clauses of a contract governed by Article 1138 of the Civil Code. It appears from the foregoing that the Court below, without in any way contradicting itself, held that the provisions of a protocol of surrender imposed by the conqueror do not constitute a contract, freely entered into, which would be subject to civil law."

[Report: *Pasicrisie Belge*, 1957, I, p. 256.]

XII.—Termination of War

War—Termination of—War Between France and Germany and Between United Kingdom and Germany—Contract to Subsist for " Five Years after Conclusion of Peace Treaties "—French Law Providing for Cessation of Hostilities on Fixed Date—Whether Period of Five Years Commences on Date Fixed—The Law of France.

TUCCI *v.* CONSORTS PECLAT-MAUNDER.

France, Court of Cassation. April 14, 1956.

THE FACTS—A contract made on June 14, 1941, between the appellant's predecessor in title and the respondents provided that the respondents, vendors of real property, were to be entitled to exercise certain rights on the property sold " until the legal cessation of hostilities and for a period of five years following the date of the last of the two peace treaties to be concluded (1) between France and Germany and (2) between Great Britain and Germany ". A French Law of May 10, 1946, fixed the date of the cessation of hostilities as being June 1, 1946, but provided—as far as here material—that where the currency of contracts depended on the existence of a state of war, no distinction should be made between the expression " state of war " and similar expressions used by the parties. The Law further provided that although the date of cessation of hostilities was fixed as June 1, 1946, this was subject to such contrary intention of the parties as might appear from the contract between them. The appellant contended that the respondents were not entitled to exercise their rights under the contract after June 1, 1951. The respondents, on the other hand, contended that they were entitled to do so until five years after the conclusion of a peace treaty between France and Germany or between the United Kingdom and Germany, whichever of the two treaties should be the last to be concluded.

Held: that the respondents' contention must be accepted and the appeal dismissed.

The Court said in part: " Although Article 1 of the Law of May 10, 1946, has fixed, as being June 1, 1946, the legal date of the cessation of hostilities for the purposes of all laws, decrees, regulations and contracts the application of which was made subject to a state of war, and has provided that no distinction shall be made between expressions such as ' state of war ' and any expressions of an equivalent character, it has expressly provided for the contingency of a derogation from this rule, either by legal provisions contained in earlier laws or by such contrary intention of the parties as might result from contracts between them. The judgment of the Court below states that ' in the present case such intention is evident from the unequivocal terms of the contract, which provides for a period extending not only until the legal cessation of hostilities but until after the signature of peace treaties '. The lower Court thus ascertained the intention of the parties, having regard to the terms of the contract, and correctly applied the Law referred to above in holding that the period stipulated by the parties did not begin to run on the date of the legal cessation of hostilities. In holding that ' the peace treaties referred to in the contract have not yet been signed and that there is no evidence that they will ever be signed ' the lower Court did not attempt the interpretation of any international treaty."[1]

[Report: *Gazette du Palais*, October 3–5, 1956.]

See also *Société des Établissements Martin* v. *Clergé*, reported *infra*.

War—Termination of—War between France and Germany—Agreement to Convey Property " at the latest within six months following upon the signature of peace "—Whether Entry into Force of Paris Convention Terminating Occupation Régime in Federal Republic of Germany Constituted " the Signature of Peace "—The Law of France.

SOCIÉTÉ DES ÉTABLISSEMENTS MARTIN *v.* CLERGÉ.

France, Tribunal Civil de Troyes. June 20, 1956.

THE FACTS.—On January 19, 1943, the plaintiffs and the defendant entered into an agreement whereby the defendant undertook to sell a house to the plaintiffs " at the latest within six months following upon the signature (*signature*) of peace ". A French Law of May 10, 1946, fixed the cessation of hostilities in the Second World War as being June 1, 1946. In proceedings instituted by the plaintiffs against the defendant in 1949 the Court held, *inter alia* and as far as here material, that, notwithstanding the Law of May 10, 1946, the plaintiffs' claim was premature, and accordingly dismissed their action. The plaintiffs subsequently brought the present action in July 1955, contending that the entry into force, on May 5, 1955, of the Paris Agreements, which ended the occupation régime in the Federal Republic of Germany, constituted " the signature of peace " within the meaning of the agreement between the parties, and that an action brought in July 1955 was therefore an action brought " within six months following upon the signature of peace ".

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[1] The Court here refers to the contention of the appellant that the Court below was not entitled to interpret a treaty, his contention being that such interpretation fell within the province of the Minister for Foreign Affairs. The Court did not deal with this argument and confined itself to the comment set out in the last sentence of its judgment (*supra*).

Held: that the plaintiffs' contention must be upheld and the defendant's undertaking carried out in accordance with the agreement between the parties.

The Court said: " While the act of only one Government suffices to put an end to the state of peace by embarking on war, the signature of a genuine peace, *viz.*, the legal re-establishment of peace, requires an agreement between different Governments capable of entering into agreements, that is, Governments free to act as sovereign States. For this reason Decree No. 51–883 of July 9, 1951, which ' put an end to the consequences of the state of war in so far as concerns the status of German citizens in France ', and which was essentially a unilateral act, cannot be regarded as ' the signature of peace '. The Berlin Declaration of June 5, 1945, whereby the three Allied Powers assumed supreme authority over Germany, although in fact it established peace between France, the United States and the United Kingdom of the one part, and Germany of the other part, made such peace legally impossible by reason of the confusion which it created between the German Government and the Governments of the ' Big Three '. On the other hand, the report of the Minister for Foreign Affairs which appears in the Decree of July 9, 1951, shows that it was the purpose of the Decree to enable the policy of the Three [Powers] to be carried out, namely, the integration of the German Federal Republic in the community of the peace-loving peoples of Europe, a policy elaborated at Frankfort (1948) and in the Washington Agreements (April 1949). It was in this spirit that on May 26, 1952, the representatives of the French Republic, the United States of America, and the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Federal Republic of Germany, of the other part, signed four Conventions (at Bonn). Article 1 (2) of the first Bonn Convention—as amended by the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, signed at Paris on October 23, 1954—provides that the Federal Republic shall exercise the full powers of a sovereign State over its internal and external affairs. The fourth Convention signed at Bonn is entitled ' Convention on the Settlement of Matters arising out of the War and the Occupation '. It follows that we are here concerned with an agreement between free and sovereign States. The intention of the four Governments to re-establish peace between them finds confirmation —if such indeed were required—in the conclusion of two further Protocols signed at Paris on October 23, 1954, of which the first was designed to make the Federal Republic of Germany and the Italian Republic accede to the Brussels Treaty of March 17, 1948, and the second to make the Federal Republic of Germany accede to the North Atlantic Treaty signed at Washington on April 4, 1949. These Protocols constitute genuine treaties of defensive alliance between —more particularly— France and the Federal Republic of Germany.

It would be unreasonable to conceive of alliances between States which are not at peace with one another, because a defensive alliance is precisely intended to maintain peace. Furthermore, the acceptance by the Government of the Federal Republic of the compulsory jurisdiction of the International Court of Justice, in accordance with the new Article 10 (the old Article 8) of the Brussels Treaty, and the acceptence of the obligations set out in Article 2 of the Charter of the United Nations, to which the North Atlantic Treaty refers, confirm the mutual agreement of the Governments concerned to establish peace between themselves. It is true that the draftsmen of the Conventions use—for reasons of high policy or in deference to contractual obligations towards third States—a terminology which is intended to create the belief that they do not constitute a treaty of peace, which is said to be an objective to be achieved later (see, in particular, Articles 2 and 7 of the Convention on Relations between the Three Powers and the Federal Republic of Germany), but it is for the courts to ascertain the true nature of agreements, and this cannot, in the present case, be in any doubt. It would be futile to contend that a state of war still exists *vis-à-vis* the German territories of the East. Article 1 of the Joint Declaration of the Governments of the United States of America, France and the United Kingdom, which is annexed to the Protocols of October 23, 1954, in fact shows that the three Governments consider the Government of the Federal Republic to be the only freely and legally constituted Government which is entitled, for that reason, to speak in the name of Germany as the representative of the German people in international affairs. So far as concerns Berlin, Article 6 of the Convention on Relations between the Three Powers and the Federal Republic of Germany provides that the Three Powers shall consult with the Federal Republic, which shall co-operate with them. Although the German frontiers have only been fixed provisionally, the German Government has at least renounced the use of force for their modification. Lastly, if the parties to the case now before the Court had the ratification of peace in mind, *viz.*, the final signature of peace, they could not reasonably have referred to a final peace. It follows from the foregoing that the Conventions signed at Bonn on May 26, 1952, and amended in Paris on October 23, 1954, constitute the peace between France and Germany envisaged by the parties in their agreement of January 19, 1943.

" In so far as concerns ratification and the time-limit of six months thereafter, Article 31 (1) of the French Constitution promulgated on October 27, 1946, provides that the President of the Republic shall sign and ratify treaties. The Treaties with which the Court is concerned were not ratified by France until after they had been ratified by the President of the Federal Republic of Germany on March 23, 1955, and they ultimately came into force at mid-day on May 5, 1955. Accordingly, the plaintiffs were within the time-limit provided in the agreement."

[Report: *Gazette du Palais*, October 3–5, 1956.]

See also *Tucci* v. *Consorts Peclat-Maunder*, reported *supra*, p. 768, in this volume.

War—Termination of—War between United Kingdom and Germany—Bill of Exchange Payable on " Conclusion of Peace "—Whether Entry into Force of Paris Agreements Terminating Occupation Régime in German Federal Republic Constitutes " Conclusion of Peace ".

MATURITY OF BILL OF EXCHANGE CASE.

German Federal Republic, Federal Supreme Court. November 15, 1956.

THE FACTS.—During the Second World War the German State Bank (*Reichsbank*) suggested a scheme whereby German exporters whose claims for payment of goods sold to customers in enemy countries had remained unsatisfied were to be put in touch with German importers who were not permitted to pay their suppliers in enemy countries. As far as here material, the scheme operated as follows:—The exporter sold to the importer for Reichsmark a fixed amount of foreign currency at the rate of exchange obtaining on the date of the contract. The exporter who, by reason of the existence of a state of war, was unable to make delivery of the foreign currency concerned entered into an undertaking to make such delivery " on the date when peace should be concluded, or at the latest three months thereafter ". The importer then drew a bill of exchange payable at sight which was accepted by the exporter and endorsed by a bank, the latter acting as surety.

The plaintiffs, who had imported goods from the United Kingdom, entered into a transaction of the kind described above with one P., who duly accepted their bill after receiving the requisite amount in Reichsmark. The plaintiffs' bill was duly endorsed by the defendant Bank, and in the present action the plaintiffs claimed payment from the defendant Bank. They contended that the bill had become payable on September 16, 1953, *viz.*, the date on which the London Debt Agreement came into force; alternatively, not later than May 5, 1955, *viz.*, the date on which the Paris Agreements of October 23, 1954, terminating the Occupation Régime in the German Federal Republic (hereinafter referred to as " the Transitional Agreements ") came into force, one or other of these dates being the date which, in accordance with the true meaning of the transaction between the parties, must be deemed to be the date of the " conclusion of peace ". The defendant Bank contended that neither of these two events constituted the " conclusion of peace ".

Held: that the plaintiffs were entitled to judgment. The date on which peace with the United Kingdom must be deemed to have been concluded within the true meaning of the transaction between the parties was May 5, 1955, *viz.*, the date of the entry into force of the Transitional Agreements between France, the United Kingdom and the United States of the one part, and the German Federal Republic of the other part.

The Court said: " A Treaty of Peace in the formal sense has not been concluded with the United Kingdom. In view of this we must consider the question whether the expression ' three months after the conclusion of peace ' can be interpreted so as to substitute for the conclusion of peace a state of affairs equivalent to the conclusion of peace. If the answer is in the affirmative, we must further consider whether such a state of affairs within the meaning of the contract between the parties has come into existence. The meaning and purpose of contracts of this kind was to enable importers to consolidate their pre-war debts in foreign currency in Reichsmark and, by purchasing the foreign currency owed by them, to enable them to avoid any currency risks. By purchasing foreign currency importers were to be put in the position of being able to discharge their debts to foreign creditors as soon as peace should be concluded. From the point of view of the economic purpose of such a contract it was immaterial whether this date was the date of the formal conclusion of peace or the date of an event which had the same effect as the conclusion of peace. It would therefore be in accordance with the intention of the parties at the time when the contract was made to interpret the expression in such a manner that, if it was not the conclusion of peace which terminated the war between the United Kingdom and Germany, but if by means of other international agreements a state of affairs arose which in the economic sense is equivalent to the conclusion of peace, there is substituted for the expression ' three months after the conclusion of peace ' the date on which that state of affairs arose or, as the case may be, a certain time thereafter. Since July 9, 1951, the Federal Republic has no longer been in a state of war with the United Kingdom. On that date the British Government handed to Secretary of State Hallstein a Note according to which the formal state of war with Germany was deemed to have ceased on July 9, 1951. On the same day, however, acting on the instructions of the British Foreign Office, the British High Commissioner in Germany addressed a communication to the Government of the Federal Republic which stated, *inter alia*, that ' contracts made before the war between persons in the United Kingdom and persons in Germany remain subject to the legislation on Trading with the Enemy '. Accordingly, we must further consider the question whether any event occurred after July 9, 1951, which resulted in a settlement of pre-war contracts between the United Kingdom and Germany.

The plaintiffs have contended that according to the view of the German State Bank, ' the economic conclusion of peace ' occurred on the date when the London Debt Agreement came into force, *viz.*, on September 16, 1953. They have further contended that at the latest on May 5, 1955, when the Federal Republic was declared to be a sovereign State (entry into force of the Paris Agreements), a state of affairs arose which in the political sense must be regarded as the equivalent of the ' conclusion of peace ' within the meaning of the contract originally made between the parties. A state of affairs equivalent to the conclusion of peace within the meaning of the contract must be deemed to have arisen on the date when normal economic relations with the United Kingdom were again possible, and in particular when it again seemed possible to settle pre-war business transactions with foreign countries, more especially those out of which claims against foreign countries had arisen. This state of affairs has not been fully created by the London Debt Agreement. That Agreement merely dealt with the settlement of debts owing to foreign countries. It did not contain a settlement of German claims against foreign countries. This is precisely what we are concerned with in the present case, because the delivery of the pounds sterling from P.'s account would become possible only when a settlement in respect of German claims was reached between the United Kingdom and the Federal Republic. The matter could also be clarified as soon as provision was made that these claims could not be confiscated. In this respect Articles 3, 4 and 5 of Part 6 (Reparation) of the Convention on the Settlement of Matters arising out of the War and the Occupation (the Transitional Agreement) provide that the Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of Agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany (Article 3, para. 1). According to Article 4, the Federal Republic may negotiate Agreements regarding German external assets which have not yet been transferred or liquidated, or where no disposition has been made in respect of the proceeds of their liquidation, with all countries which have been at war with Germany since September 1, 1939, but are not members of the Inter-Allied Reparation Agency (I.A.R.A.). With the exception of cases not here material, the Federal Republic can only make agreements with members of I.A.R.A. in respect of assets which these member States, in accordance with Part III of the Rules of Accounting of I.A.R.A., may voluntarily exclude from accounting, to their own detriment, in accordance with Part III (Article 4, paras. 1 and 2 (*a*)). The so-called I.A.R.A. States are the nineteen States which have concluded the Paris Reparations Agreement of January 14, 1946.

The United Kingdom is one of these States. The defendant Bank has not adduced any evidence to the effect that the sterling claim sold by P. to the plaintiffs falls within the class of assets with regard to which the Federal Republic may conclude Agreements with the United Kingdom in the latter's capacity as a member of I.A.R.A. Finally, Article 5 of Part VI of the Transitional Agreement provides that the Federal Republic shall take steps to compensate the former owners of property which has been seized. It follows from these provisions that according to this Agreement, which forms part of the Paris Agreements, there is no prospect of the release of claims against the United Kingdom from pre-war business transactions. This Agreement, which according to Article 1 of the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, enters into force with this Protocol, has, in accordance with a proclamation of the Federal Chancellor of May 5, 1955, come into operation on the latter date. On that date the fate of contracts such as the one here in issue was decided. Claims against the United Kingdom arising from pre-war business transactions were not to be discharged by the English debtors. The creditors, in accordance with Article 5 of Part VI of the Transitional Agreement, are referred to compensation to be made by the Federal Republic. The date of the entry into force of the Transitional Agreement, according to the meaning and purpose of contracts of the kind here in issue, must be regarded as the date of an event equivalent to the conclusion of peace."

[Report: BGHZ, vol. 22, p. 148.]

War—Termination of—Distinction between Cessation of Hostilities and Conclusion of Peace—Booty of War Taken After Termination of Hostilities but Before Conclusion of Peace.

NORWEGIAN STATE *v.* BRÖDR. WILHELMSENS SKIPSREDERI (*THE TOREFJELL*).

Norway, Supreme Court. January 26, 1956.

THE FACTS.—After the invasion of Norway on April 9, 1940, the Norwegian naval authorities requisitioned the *Torefjell*, a privately-owned motor ferry boat, for use against the German forces. The boat was camouflaged, equipped with rails, and used as a mine-layer. When the Norwegian forces in the western part of the country surrendered in May 1940, the owners attempted to escape with the boat, but they were required to proceed to the town of Laerdal to evacuate military personnel. In the meantime, the owners had removed the rails and tried to remove all evidence that the boat had been used for military purposes. However, after two days the boat was seized by the German forces as booty of war. After some time the owners managed to recover the use of the boat and they had it in their possession when the German forces surrendered in 1945. The boat was then taken over by the Norwegian authorities. The question of the amount of compensation due to the owners of the boat depended to a large extent on whether the ship had been legally taken as booty by the German forces. This question was the only one of interest as far as international law is concerned.

Held (by the Court of First Instance): that the taking by the German forces of the *Torefjell* as booty of war was not in violation of international law even though hostilities had terminated at the place where it was seized.

The Court said: " They [the German forces] took possession of the ferry in closed waters barely two days after the cessation of hostilities occasioned by the surrender of the Norwegian forces in that part of the country. The boat was still fitted out as a naval vessel, since it had been impossible to remove the camouflage painting which clearly proved that the boat had taken part in naval operations."

On appeal to the Supreme Court, the parties agreed that the taking of the boat as booty of war was not in violation of international law.

[Report: *Rt.*, 1956, p. 70.]

NOTE.—Although, in the result, the parties agreed on the question of title as created by booty and although the decision of the lower Court confirms the general judicial practice on the subject, the peculiarities of the facts would appear to justify the inclusion of this report.

War—Termination of—Cessation of Hostilities—Interpretation of Phrase " three years counted from the date peace in the Orient is proclaimed ".

DIZON AND TIMBOL *v.* PARAS.

Philippines, Court of Appeals. November 29, 1955.

THE FACTS.—In August 1944, the defendant executed in favour of the plaintiffs a promissory note which was to be paid " within three years counted from the date peace in the Orient is proclaimed". In January 1950 the plaintiffs, fearing the insolvency of the defendant, attached certain real estate owned by him and brought this action in the Court of first instance to recover the amount of the note. The obligor defended on the grounds that a moratorium order of the Government of the Philippines rendered the obligation unenforceable and that the obligation had not yet matured under the terms of the note. The Court of first instance found that the action had been brought prematurely because of the moratorium order, awarded damages to the defendant for losses caused by the attachment, and dismissed the case. The plaintiff appealed.

Held: that the judgment of the Court of first instance dismissing the case must be affirmed, but without damages against the plaintiff. The Court of Appeals held that the moratorium was a legal nullity. As a question of fact, the Court found that the defendant had not been insolvent; therefore the date of maturity remained that specified in the note.

With regard to the date of maturity the Court said: " It is well-settled rule in this jurisdiction that the language of a writing is to be interpreted according to the legal sense it bears in the place of its execution, and that where it is clearly stipulated in a contract that the obligation therein recorded shall mature or become enforceable within a certain period after peace has been declared, or after the end of the war, that period shall be computed after some final proclamation of peace in the country is made by a competent authority. *General* v. *Venecia*, 44 *Off. Gaz.*, 4912; *Raquiza* v. *Bradford*, 41 *Off. Gaz.*, 262; *Yamashita* v. *Styer*, 42 *Off. Gaz.*, 664; *Untal* v. *Chief of Staff*, 47 *Off. Gaz.*, 1147.[1] In the recent case of *Fabie* v. *Court of Appeals*, G. R. No. L–6386, March 29, 1955, the Supreme Court held:

" ' Requested to apply *General* v. *Venecia*, 44 *Off. Gaz.*, 4912, wherein we ruled that in July 1947 a promisory note had not yet matured because it was payable " within six months after peace has been declared ".

" ' The Court of Appeals declined, making a distinction between " termination of war " and " proclamation of peace ", and quoting authorities to the effect that war terminates when hostilities cease.

" ' The *General* case involved a contract referring expressly to declaration of peace; and it is not clearly erroneous to deny its application where parties to another contract (as in this litigation) refer to termination of war, without express reference to " peace ". However *Raquiza* v. *Bradford*, 41 *Off. Gaz.*, No. 7, p. 262, which was cited in *General* v. *Venecia*, clearly stated that in September 13, 1945, the war has not yet terminated, because war, in the legal sense, continues until, and terminates at the time of, some formal proclamation of peace by an authority competent to proclaim it. That view was reaffirmed in *Yamashita* v. *Styer*, 42 *Off. Gaz.*, 664, and in *Untal* v. *Chief of Staff*, 47 *Off. Gaz.*, 1147. Such holding is amply sustained by additional authorities quoted in petitioner's brief.'

" The promissory note involved in this action clearly stipulates that the obligation therein recorded shall be payable ' dentro de los tres (3) años a contar desde la fecha de proclamada la paz en el Oriente ' (within three years counted from the date peace in the Orient is proclaimed). The phrase ' within three years counted from the date peace in the Orient is proclaimed ' is of the same import as the phrase ' within six months after peace has been declared ' set forth in the promissory note involved in the *General* case, and ' three months from and after the termination of war ' set forth in the contract involved in the *Fabie* case. There can be no question, therefore, that the ruling of the Supreme Court above referred to is applicable to the case at bar, and that it must be held that, as no final treaty of peace has been signed by and between the Republic of the Philippines and the Empire of Japan, the Pacific war, in so far as courts are concerned, is in a legal sense not yet terminated and there is no peace yet in this part of the globe. Hence, the obligation recorded in the promissory note involved in this action is as yet unenforceable.

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[1] [See, as to these cases, the Note *infra*, pp. 778–780.]

" The judgment appealed from, therefore, in so far as it dismisses this action, is correct. But, we believe that the award of damages therein should be eliminated therefrom. . . . Under the circumstances, the request for the issuance of a preliminary writ of attachment of the properties of the appellee at the time this action was commenced was fully justified. The latter may have suffered damages due to the attachment of his property, but he cannot hold the appellants liable therefor.

" Wherefore, modified as indicated above, the judgment appealed from is hereby affirmed, without costs."

[Report: *Official Gazette*, 52 (1956), p. 2027.]

NOTE.—(1) In *General* v. *Venecia* the petitioner, who was the defendant in an action on a promissory note in the Court of first instance, sought annulment by the Supreme Court of an order of the Court of first instance denying his motion to dismiss the complaint. The note which was the subject of the action in the Court of first instance called for payment " within six (6) months after peace has been declared and government established in the Philippines ". The Supreme Court granted the petition. The Court held that action could not be brought on the note in view of the debt moratorium orders of the President of the Philippines, and continued: " But the case for petitioner is stronger when we reflect that his promise is to pay ₱4,000 ' within six months after peace has been declared.' It being a matter of contemporary history that the peace treaty between the United States and Japan has not even been drafted, and that no competent official has formally declared the advent of peace (*see Raquiza* v. *Bradford*, 41 *Off. Gaz.*, 262), it is obvious that the six-month period has not begun; and Luis F. General has at present and in June 1946 no demandable duty to make payment to plaintiffs, independently of the moratorium directive." [*Official Gazette*, 44 (1948), p. 4912.]

(2) *Raquiza et Al.* v. *L. J. Bradford et Al.* involved a petition for a writ of *habeas corpus* brought in the Supreme Court of the Philippines on August 30, 1945. The petitioners had been confined pursuant to the authority of a proclamation of the Commander-in-Chief of the United States Army, which provided for the restraint of persons who had collaborated with the enemy " for the duration of the war ". The Court noted that the power of the Commander-in-Chief to issue the proclamation had not been challenged, and continued: " Has the war terminated within the meaning of that part of his proclamation wherein the Commander-in-Chief declared his purpose to hold such persons in restraint ' for the duration of the war '? We are of the opinion that it has not.

" In the case of *United States* v. *Tubig* (3 Phil., 244, 254), this Court said: . . . ' It is necessary to refer to a public act of the Executive Department to fix the closing of the war. . . . War, in the legal sense, continues until, and terminates at the time of, some formal proclamation of peace by an authority competent to proclaim it. It is the province of the political department, and not of the judicial department, of government to determine when war is at an end. . . .'

" And even if the war had terminated, we are of opinion that under the aforesaid proclamation the petitioners, who are held in restraint thereunder, would continue legally under custody of the proper military authorities of General of the Army MacArthur's or his successor's command, for a reasonable time after termination of the war." The petition for *habeas corpus* was therefore denied. [*Official Gazette*, 41 (1945), p. 262.]

(3) *Yamashita* v. *Wilhelm D. Styer, Commanding General, United States Army Forces, Western Pacific,* involved a petition for a writ of *habeas corpus* in the Supreme Court of the Philippines to challenge the status of the petitioner as a war criminal charged before a military commission appointed by the respondent. The Court held that since the military commission had not been made a party respondent no order might be issued requiring it to refrain from trying the petitioner. The Court continued: " Furthermore, this Court has no jurisdiction to entertain the petition even if the commission be joined as respondent. As we have said in *Raquiza* v. *Bradford* (41 *Off. Gaz.*, [No. 7], pp. 626, 634), ' an attempt of our civil courts to exercise jurisdiction over the United States Army before such period (state of war) expires, would be considered as a violation of this country's faith, which this Court should not be the last to keep and uphold.' (Parenthesis supplied). . . .

" True that the rule was made applicable in time of war, and there is a conflict of opinion as to whether war has already terminated. War is not ended simply because hostilities have ceased. After cessation of armed hostilities, incidents of war may remain pending which should be disposed of as in time of war. ' An important incident to a conduct of war is the adoption of measures by the military command not only to repel and defeat the enemies but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.' (*Ex parte Quirin*, 317 U.S. 1, 63 Sup. Ct. 2)," The Court, concluding that the military commission was duly constituted and had jurisdiction over the accused and the offence, dismissed the petition. [*Official Gazette*, 42 (1946), p. 664.]

(4) *Untal* v. *The Chief of Staff, Armed Forces of the Philippines, et Al.*, involved a petition for a writ of *certiorari* in the Supreme Court of the Philippines. The Court dismissed the petition and the petitioner moved for reconsideration. The petitioner, a member of the armed forces of the Philippines, was being tried by court martial for a violation of the Ninety-third Article of War. This article was applicable to any person who had committed murder in time of war. The petitioner urged that he could not be tried under this article since the Philippines were not at war on November 4, 1947, which was the date of the alleged offence. The Court said: " Although active hostilities terminated with the signing of the Armistice on September 2, 1945, officially the United States and, consequently, the Philippines, were still at war, when petitioner committed his offense, because no treaty of peace has been signed yet between the

nations which participated in the armed conflict with Japan. It, therefore, follows that the crime committed by this prisoner was perpetrated in time of war and is triable under the provisions of the 93rd Article of War." The Court therefore denied the motion for reconsideration. [*Official Gazette*, 47 (1951), p. 1147.]

War—Termination of—Fate of Enemy Property—Confiscation of Property for Purpose of Reparation—Paris Agreement of October 23, 1954, on Settlement of Matters arising out of the Occupation of Germany.

See p. 21 (*AKU Case*).

XV.—Miscellaneous

War—In General—Miscellaneous—War of Agression—Purported Title Acquired by Occupant in War of Agression.

See p. 810 (*N.V. De Bataafsche Petroleum Maatschappij and Others* v. *The War Damage Commission*).

B—WARFARE ON LAND

II.—Appropriation, Utilization and Destruction of Enemy Property

Warfare on Land—Appropriation of Enemy Property—Booty—Ships as Booty—Seizure in Inland Waters—Seizure After Termination of Hostilities but Before Conclusion of Peace.

See p. 775 (*Norwegian State* v. *Brödr. Wilhemsens Skipsrederi*).

III.—Occupation of Enemy Territory

i.—Nature and Effects of the Occupation

Belligerent Occupation—Nature and Effects of—Right of Occupant to Exercise Right of Territorial State to Call Upon Lighthouse Concessionaire To Do Repairs—Rejection of Allegation of Unjust Enrichment.

Lighthouses Arbitration between France and Greece.
Claim No. 13.
Permanent Court of Arbitration. July 24, 1956.
(Verzijl, President; Mestre, Charbouns.)

The Facts.—(See *supra*, p. 659.) This was a claim for damage to the light at Dedeagatch, in the following circumstances. Dedeagatch remained in the hands of the Bulgarian forces until December 1, 1919, on which date the town and its surroundings were provisionally occupied by French forces. On May 27, 1920, the Greek forces took over from the French. In the intervening period, or shortly afterwards, the Dedeagatch light suffered certain damage, of which not only the exact date but also the persons responsible were unknown. The evidence was scanty and inconclusive. The French case attributed the damage to the acts of Greek troops. The Greek argument attributed it to acts of war committed either by forces other than Greek, or by Greek forces in the legitimate exercise of the law of war [*sic*]. The light was eventually repaired by Collas & Michel on the demand of the occupation authorities and Collas & Michel now claimed the cost of the repairs.

Held: that the claim must fail. Apart from the insufficiency of the evidence as to who actually caused the damage, there were no legal grounds for making Greece responsible for the cost of the repairs on the footing of unjust enrichment. Repairs were the obligation of the concessionaires, and the Greek occupant was doing no more than Turkey, as the territorial State, had, as grantor, the right to do, in calling upon them to do repairs.

The Tribunal, after reviewing the evidence, said: " The recapitulation of different sets of facts and contradictory suppositions does not, at this time, allow a conclusion to be drawn as to the course of events. The justification of the claim depends, therefore, in the first place, on its juridical basis and, secondarily, on the formal consequences of the insufficiency of the evidence. As regards the juridical basis of the claim or of its refutation, the parties have taken up different positions. But one thing is certain, and that is that it was the Greek authorities who, as organs of an occupying Power, requested or required the firm of Collas & Michel to put the Dedeagatch light in order. Is this fact sufficient to enable one to regard Greece as responsible for the cost of the repairs, quite apart from the possible causes of the damage to the light? . . .

" In June 1920, Greece was not yet grantor State by subrogation. She could not in any case demand from the concessionaire firm more than the territorial State could, nor enrich herself without due cause at the expense of the concessionaire. It is clear that Greece did neither one nor the other. The territorial State would certainly have been within its rights in requiring the light to be repaired, subject to an eventual sharing of the cost between itself and the firm, if the latter could prove that the damage was due to *force majeure* (Article XII of the concession of 1860). The consequence of the repairs does not constitute for either the territorial or the occupant State an unjustified enrichment seeing that the repairs themselves were among the normal obligations of the concessionaire firm.

" This head of claim is, therefore, not well founded in law, and must be rejected."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 93.]

Belligerent Occupation—Nature and Effects of—Whether Occupant Entitled to Rights of Enemy State under Concessionary Contract —Lighthouse Built by Occupant in Occupied Territory—Vesting in Enemy State after Occupation—Claim for Reimbursement of Cost—Relevance of Principle of Unjustified Enrichment.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Counterclaim No. 9.

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *supra*, p. 659.) This counterclaim related to the cost of the erection by Greece, in 1918, of a dioptic port beacon on a wooden tripod, with fixed red light, in the port of Tenedos, a work the cost of which was said to have amounted to 3,000 drachmas, at the value then current.

The Isle of Tenedos was militarily occupied by Greece in 1912. It was to have been restored by her to Turkey under the decision of the Great Powers of February 13, 1914; it remained, however, without interruption under the military occupation of Greece, notably during the period of the territorial settlement projected at Sèvres (1920) which assigned Tenedos to Greece. It was definitively restored to Turkey in 1924, after the coming into force of the Treaty of Peace of Lausanne, 1923. At the time of the restoration of the island, the Greek authorities left there the beacon which had been set up in 1918.

Held: that the counterclaim must fail. In 1918, Greece was in military occupation of Tenedos but that did not give her any rights under the concessionary contract between Turkey and Collas & Michel. In any event, under that contract the firm were no longer bound to contribute to the cost of erecting new lights.

The Tribunal said: " It is upon these facts that the Greek Government considers that it can found its counterclaim of 3,000 drachmas. But what juridical arguments could justify it? In 1918, the Greek authorities were in Tenedos as agencies of an occupying power and they were never there in any other right. Greece has never, therefore, been subrogated, even temporarily, in the Turkish concessionary contract for the Isle of Tenedos. If she thought it necessary to erect a new beacon there, she did so on her own account and entirely outside the scope of the provisions of the concession. Moreover, even if the concessionary contract of 1894 could be deemed applicable, Greece could not take advantage of its provisions, seeing that . . . the firm of Collas & Michel were, since 1899, no longer burdened with any obligation to contribute to the cost of erecting new lights.[1]

" The only other reason which could still be invoked by hypothesis would be a supposed general principle of law governing a case of unjustified enrichment, but even on that hypothesis Greece would not recover anything. The existence of an additional light would not in any way benefit Collas & Michel: their receipts were not increased by its existence; on the contrary, the new concessionary contract of 1913 obliged them, from 1924 in fact, to maintain the new beacon at their expense. . . . If there was reason for Greece to recover from any other quarter the expenses of erecting the port beacon at Tenedos, such a claim should not be brought against Collas & Michel but rather against Turkey, who was to acquire the beacon gratis at the end of the concession.

" Counterclaim No. 9 must therefore be dismissed."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 126.]

Occupation of Enemy Territory—Nature and Effects of—Status of Agency of Occupant—Occupation of Germany—Joint Export-Import Agency—Whether Exempt from Jurisdiction of German Courts—Counterclaim against German Company to whom Joint Export-Import Agency Had Assigned Assets and Liabilities—Counterclaim Arising from Debt Originally Owed by Joint Export-Import Agency—Whether German Courts Entitled to Exercise Jurisdiction over Counterclaim.

JOINT EXPORT-IMPORT AGENCY (GERMANY) CASE.

German Federal Republic, Federal Supreme Court. January 10, 1956.

THE FACTS.—In 1946 the British and United States occupation authorities in Germany set up the Joint Export-Import Agency (hereinafter referred to as " JEIA ") whose duty it was to exercise control over all transactions of German firms involving the import and export of goods. When JEIA was wound up its assets and liabilities were assigned to the plaintiffs, a German Company owned by and operating under the direct control of the Government of the German Federal Republic. At that time the defendants owed a sum of money to JEIA. In an action by the plaintiffs for payment of this sum of money, the defendants sought to set off and/or counterclaim for a larger sum of money which they alleged to be owing to them, as assignees, by JEIA by reason of the fact that JEIA had allegedly incited a Danish firm to break a contract with their assignors, a German firm, thereby causing the latter damage. The plaintiffs

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[[1] Under the terms of the second paragraph of Article III of the third concessionary contract, of 1894: " The cost of repair and of administration of all the lighthouses in existence on 4 September 1899 (N.S.), the date of the expiration of the term of the present concession, shall be borne by the concessionaire . . .", the maintenance of new lights to be constructed between 1899 and 1924 remaining at the cost of the grantor State.]

contended that the defendants were not entitled to invoke the jurisdiction of the German courts to determine their alleged counterclaim, on the ground that as JEIA would have been exempt from the jurisdiction of the German courts, the latter were not entitled to exercise jurisdiction over the counterclaim.

Held: that as JEIA would have been exempt from the jurisdiction of the German courts, the latter lacked jurisdiction to determine the alleged counterclaim which, if JEIA had not been wound up, would have been directed against JEIA.[1]

The Court said: " The defendants were indebted to JEIA in the sum of 6,136.57 Deutschemark. JEIA assigned this claim to the plaintiffs, a Company owned by the Federal Republic. The defendants were adjudged liable in the said sum, without prejudice to any judgment which might subsequently determine the defendants' right of set-off and counterclaim. Meanwhile, in order to prevent execution being levied, the defendants have paid to the plaintiffs a sum of 6,681.29 Deutschemark which they now claim by way of counterclaim. The following are the facts on which the counterclaim is based: In October 1947 an important contract was concluded, with the co-operation of JEIA, between a firm carrying on business in Hamburg and a Danish firm. The contract was concerned with the treatment of African timber by the Hamburg firm, and the latter concluded with the Danish firm simultaneous contracts involving imports and exports. The timber which was imported into Germany was to be made into veneers and was subsequently to be exported to Denmark. Whereas the contracts involving the import of the timber were carried out, the contracts involving subsequent export were not carried out. The defendants put forward the following contentions:

" JEIA relieved the Danish firm of all liabilities concerning the export business and invalidated the contracts for the export of the veneers, without notifying the Hamburg firm. The refusal of the Danish firm to take delivery of the goods was an entirely unjustified breach of contract, and JEIA acted illegally in relieving the Danish firm of its liabilities under the contract. In so acting JEIA exceeded its functions and therefore became liable to the Hamburg firm in damages. The claim of the Hamburg firm, which amounts to more than 3 million Deutschemark, has been assigned in an amount of 7,000 Deutschemark to the defendants for the purpose of being set off by the defendants in the present action.

" [The Court stated certain further facts and continued:] JEIA was an organization which performed certain functions in the name of the Allied High Commission, and as such it was an occupation authority within the meaning of Article 1 of Allied High Commission

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[1] In a case where JEIA were plaintiffs in an action against a German importer on whose behalf they had paid the purchase price of imported goods, the Higher Court of Appeal of Hamburg *held* that the German courts were entitled to exercise jurisdiction: Judgment of January 14, 1956 (*Betriebsberater*, 1956, p. 291).

Law No. 2 and Article 1 (5) of Chapter 1 of the Convention on the Settlement of Matters arising out of the War and the Occupation. JEIA is and was therefore not subject to the jurisdiction of the German courts. The provision so made by the law of the Occupant is in accordance with the rule of international law that a foreign State is not subject to the local jurisdiction, certainly in so far as concerns claims made against it which have their origin in the exercise of the sovereign activity of such State. Notwithstanding that the sovereign acts of a State do not produce any effect outside the territory of that State, we cannot deny to the sovereign acts of the Occupying Powers their effect in Germany, because the Occupying Powers exercised sovereign authority in Germany by virtue of occupation law.

" The defendants contend that JEIA violated its official duties by invalidating the export contracts. JEIA, on the other hand, says that the reason for the non-execution of these contracts was the inability of the Danish firm to provide the required letter of credit. JEIA further argues that it did not invalidate the contracts, but merely gave the necessary administrative directions, in view of the failure to provide the letter of credit, to dispose of the veneers in Germany or by way of re-export.

" For the determination of this action it is immaterial how the action taken by JEIA is to be evaluated in law; it is immaterial whether this was a cancellation of a licence previously granted and whether such concellation was lawful. JEIA was not a contracting party, and it did not act in a private capacity. From whichever legal angle we may look at the action taken, this was the result of the exercise of sovereign functions in connection with the direction and control of the German export trade. The violation of the duty which the plaintiffs (*sic*) allege against JEIA was not in law a breach of contract, but can only be classified as a violation of official duties. That alone is relevant.

" The question whether the German courts are entitled to exercise jurisdiction must be determined in accordance with the Protocol of October 23, 1954, providing for the termination of the occupation régime in the Federal Republic of Germany, which came into operation on May 5, 1955. This provides that the German courts shall not exercise jurisdiction in non-criminal proceedings arising from acts or omissions dating from before the coming into operation of the Convention (between the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic, of the one part, and the Federal Republic of Germany, of the other part), if immediately before the coming into operation of the Convention the German courts were not entitled to exercise jurisdiction in respect of such acts or omissions, irrespective of whether jurisdiction was lacking *ratione materiae* or *ratione personae*. Before the coming into operation of the Convention the jurisdiction of the German courts was governed by Law No. 13 of the Allied High Commission, which was repealed with effect from the date of the coming into force of the Convention. According to Article 2 of Law No. 13, claims arising from a violation of the official duties of the occupation authorities were exempt from the jurisdiction of the German courts. This provision was in accordance with the rule of international law, to which reference has been made, that acts in exercise of the sovereign authority of a foreign State are, as a rule, not subject to the jurisdiction of the courts of the forum. We need not determine the question whether this rule of international law constitutes an exemption *ratione materiae*, *viz.*, without having regard to the person of the defendant. In any event, this rule applied according to occupation law. Nor can the jurisdiction of the German courts be assumed on the ground that JEIA might have submitted to the jurisdiction by assigning its claim to the plaintiffs herein for the purpose of enabling the latter to institute proceedings in respect thereof. Apart from the fact that we cannot assume a desire to submit to the jurisdiction a set-off and counterclaim which are in no way related to the claim, such an assumption cannot—as a general rule—be made where the claim arises from a contract of private law while the defence or counterclaim arises from a set of circumstances concerning the exercise of sovereign authority. It might have been otherwise if the Federal Republic, by virtue of a treaty or law, had been liable for violations by JEIA of the latter's official functions, not only to the Occupying Power but also to the creditors of the latter, or if the Federal Republic had at least been liable to be sued as a defendant in respect of such matters. None of these considerations applies here. On the contrary, the Federal Republic has expressly refused the assumption of such liability. Such refusal is in conformity with the principle that, as a rule, a State is not liable for a violation of the official functions of another State. Nor can the liability of the Federal Republic be deduced from section 419 of the Civil Code.[1] Even on the assumption that the Federal Republic took over the assets of JEIA within the meaning of this provision, it would be highly questionable how far the Federal Republic could be held liable for obligations of JEIA arising from public law. In any event, the Federal Republic cannot be held liable, by virtue of this provision, for such obligations of JEIA arising from public law as are founded on tort (violation of official duties). We arrive at the conclusion, therefore, that the set-off and counterclaim based on an alleged violation of duty by JEIA are not subject to the jurisdiction of the German courts. Accordingly, the lower courts should have refused to exercise any jurisdiction over the set-off and counterclaim, but the dismissal of the counterclaim by way of a judgment on the merits is nevertheless unobjectionable."

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[1] Section 419 provides that where a person takes over the assets of another by contract, the creditors of the latter are entitled, without prejudice to the continuing liability of the former debtor, to assert all claims also against the person who has taken over the assets.

[Report: BGHZ, 19 (1956), p. 341.]

Belligerent Occupation—Nature and Effects of Occupation—Effect on Contract of Agency—The Law of Burma—International Capacity of Allegedly New States—Declaration of War by Burma upon Great Britain—Conferment of Independence by Japan upon Burma During the Japanese Occupation—Powers of Occupant.

CHETTIAR *v.* CHETTIAR.

Burma, High Court of Rangoon. April 5, 1948.

(U Thein Maung C.J.; U San Maung J.)

THE FACTS.—A contract of agency was made between a principal residing in India and an agent in Burma. The question arose whether the occupation of Burma by the Japanese brought the above contract to an end or whether the contract remained valid in spite of interruption of communications between principal and agent. The question also arose whether a declaration of war by " independent " Burma on Great Britain had any effect on the transaction. These questions were considered by the High Court sitting as a Court of Appeal.

Held: that the contract of agency was not terminated by the enemy occupation of Burma and that the appeal contending to the contrary must be dismissed. The Court considered this question as essentially one of municipal law and not one of international law. As to the declaration of war by Burma on Great Britain, it had no legal effect as the conferment of independence by Japan on Burma during the war did not make the latter an international person.

The Court said: " The question as to the effect of the outbreak of war or enemy occupation on contracts must be decided in accordance with municipal law. Oppenheim stated at page 254 of *International Law*, Vol. II, 6th edition revised: ' The matter is one essentially of Municipal as distinguished from International Law.' . . . So what we have to consider is whether Indian principals (who are British subjects) became enemies of Burma . . . according to the Municipal Law of Burma—and not whether their agents in Burma became enemies of British India according to the Municipal Law of India. Even though British subjects in India might have to regard the inhabitants of Burma as their enemies, the latter may not be required by their Municipal Law to regard the former as their enemies. The Municipal Law of Burma on this question is to be found in the Contract Act, the Defence of Burma Act, 1940, and the Defence of Burma Rules, which continued to be in force in spite of enemy occupation. " After considering these Acts and Rules the Court came to the conclusion that " the contracts of agency did not become illegal as the principals did not become enemies." The Court also referred to Burmese Municipal Law in force during the Japanese occupation and to the decision of the Supreme Court of Burma in *A.S.N.S. Firm, etc.* v. *Maung Po Khin, etc.* (Civil Reference No. 2 of 1943), in which the Court (sitting during the Japanese occupation) held that

> ' what is now clear is that the national character of Burma and its people remains as it was before; consequently British Indian subjects living either in Burma or in India cannot be treated as " alien enemies " of this country. The necessary and in fact the inevitable corollary that follows from this is that British Indian subjects residing in India can sue in any Court in Burma.'

The Court continued: " This ruling of the Supreme Court must have been ' accepted by the public as the basis of their transactions for a length of time '. Even after the liberation of Burma a Bench of the High Court of Judicature at Rangoon decided in *R.M.M.R.M. Perichiappa Chettiar* v. *Ko Kyaw Than* (Civil 1st Appeal No. 34 of 1947) that a contract of agency between an agent in Burma and his principal in British India is not abrogated by the Japanese occupation of Burma and that the agent could even act in the emergency under Section 189 of the Contract Act; and the public must have accepted the ruling as the basis for many more transactions. . . . W. E. Hall, who has always been regarded as most characteristically British and positivist in his exposition of International Law, has stated at page 579 of his *International Law* (8th edition):

> ' Thus judicial acts done under the control of the occupant, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of Municipal Law, remain good. Were it otherwise, the whole social life of the community would be paralysed by an invasion (that is occupation) . . .'

" In support of the view that the agency was abrogated by enemy occupation it was also contended that Burma had declared war on Great Britain on 1st August 1943. The argument was put forward that ' As a result thereof citizens of the rest of the British Empire became enemies of the inhabitants of enemy occupied Burma.' However, a declaration of war is a communication by one State to another that the condition of peace between them has come to an end and a condition of war has taken its place (see *Oppenheim's International Law*, Vol. II, 6th edition revised, page 237). So, before Burma can declare war on Great Britain or any other State, Burma must be a State and therefore a subject of International Law [but] Burma was not a State, not even a Dominion, at the time of the alleged declaration of war. It was only a dependency in the British Empire. It is true that the Japanese purported to confer independence on Burma after they had occupied it, but they had no power to do so under international law. Oppenheim has stated at page 342 of his *International Law*, Vol. II, 6th edition revised: 'As the right of an occupant in occupied territory is merely a right of administration, he may neither annex it while the war continues nor set it up as an independent State.' He also added at page 344, *ibid*: 'Nor may he compel them to take an oath of allegiance. Since the authority of the occupant is not sovereignty, the inhabitants owe no temporary allegiance to him.' . . . Burma never had the necessary status to declare war on Great Britain and . . . the alleged declaration of war can have no legal effect."

[Report: 1948 B.L.R. 278.]

Belligerent Occupation—In General—Administration of Occupied Territory After Cessation of Hostilities—Whether Covered by Terms of Peace Treaty Referring to Action "in the course of prosecution of the war".

See p. 687 (*Public Trustee* v. *Chartered Bank of India, Australia and China*).

ii.—Legislative, Judicial and Administrative Functions of the Occupant

Belligerent Occupation—Judicial Functions of Occupant—Whether Tribunals of Occupant Foreign or Municipal Tribunals—Person Convicted of Criminal Offence by Tribunal of Occupant—Whether Courts of Formerly Occupied Country Competent to Determine Application for New Trial after Cessation of Occupation—Bonn Convention on the Settlement of Matters Arising Out of the War and the Occupation of Germany, 1955.

RETRIAL OF CONVICTED CRIMINAL (GERMANY) CASE.

German Federal Republic, Federal Supreme Court. July 13, 1956.

THE FACTS—The German Code of Criminal Procedure provides that a person convicted of a criminal offence may, in certain circumstances, apply for a new trial. It further provides that where in any criminal proceedings the competent court cannot be ascertained, such court shall be designated by the Supreme Court. The applicant, in pursuance of the latter provision, applied for the designation of the competent court in the following circumstances: He had been convicted of a criminal offence by a tribunal of the United States occupation forces at a time when Germany was an occupied country. The occupation of the territory forming part of the Federal Republic of Germany was brought to an end in 1955, and one of the Treaties concluded between the former Occupying Powers and the Federal Republic provided that

> "all judgments . . . in criminal matters . . . rendered in Germany by

> any tribunal . . . of the Three (Occupying) Powers . . . shall remain final and valid for all purposes under German law and shall be treated as such by German courts and authorities."

The applicant contended that as his conviction by a United States tribunal was, in accordance with the Treaty provision here referred to, to be treated as " valid under German law ", the Supreme Court was under a duty to designate a German court to determine his request for a new trial, as though his request were one for the re-trial of a cause previously determined by a German court.

Held: that, notwithstanding that, in accordance with the jurisprudence of the Supreme Court, judgments of occupation tribunals were not regarded as judgments given in the exercise of German jurisdiction, the applicant was entitled to succeed on the true interpretation of the relevant provision (see *supra*) of the Treaty between the Occupying Powers and the Federal Republic of Germany, and that a German court must therefore be designated to determine his application for a new trial.

The Court said: " The application is admissible. In these proceedings we are not concerned with the question whether the application is valid on the merits. It is, however, a condition precedent of the power to designate a competent court that a German court can generally be competent in matters of this kind. The general competence of German courts for the proposed proceedings for a re-trial is present here. According to the established jurisprudence of the Supreme Court, the tribunals of the Occupying Powers in Germany did not exercise German jurisdiction. The question, however, as to whether there can be a new trial by German courts, in accordance with the German Code of Criminal Procedure, of issues finally determined by such occupation tribunals, must be decided in accordance with the provisions of the Convention on the Settlement of Matters arising out of the War and the Occupation. This Convention does not make express provision for a re-trial of this kind, although the Rules of Procedure of American and French occupation tribunals previously provided for a re-trial in favour of a convicted person. It may, however, be inferred from Article 7 (1) of the Convention that a re-trial is permissible. . . . Article 7 (1) of the Convention provides that all judgments and decisions in criminal matters heretofore or hereafter rendered in Germany by any tribunal or judicial authority of the Three Powers or any of them shall remain final and valid for all purposes under German law and shall be treated as such by German courts and authorities. Article 7 (2)–(4) of the Convention accordingly provides that the sentences of the occupation tribunals shall be carried out by the German authorities in the same manner as is prescribed for persons sentenced by German courts. To this extent, therefore, the Federal Republic has become the successor in title of the former Occupying Powers and has assumed responsibility for persons so convicted. It can be inferred from the reference to German law which is contained in Article 7 (1) of the Convention that the content and scope of the binding force of judgments must be determined in accordance with German law. This also applies to those limitations of the binding force of judgments for which the German law of procedure provides. Accordingly, a re-trial is permissible in respect of binding judgments of the occupation tribunals under the same conditions as a re-trial of issues determined by German courts. This can also be inferred from the fact that the Bonn Treaties restored to the Federal Republic its sovereignty, which is limited only to the extent that express provision has been made for such limitation. No such provision is contained in Article 7 (1) of the Convention or anywhere else in the Treaties. This interpretation of the Treaties is not affected by the provisions contained in Article 7 (5)–(7) of the Convention, which provide for the exercise of the right of clemency,[1] because the exercise of that right is of a different nature. Clemency is accorded to a guilty person, whereas a re-trial is intended to determine whether a person has been rightly convicted. In accordance with the foregoing we find that the German courts are generally competent to hold a new trial to determine issues previously determined by the judgment of an occupation tribunal."

[Report: NJW, 9 (1956), p. 1766.]

Belligerent Occupation—Legislative and Judicial Functions of Occupant—Whether Occupant Has Power to Legislate in Social Field and in Matters of Family Law—German Occupation of Norway—Provision of Maintenance for Child of German Father and Norwegian Mother.

A. *v.* OSLO SPAREBANK (THE CROWN INTERVENING).

Norway, Supreme Court. January 14, 1956.

(Gundersen, Kruse-Jensen, Helgesen, Thrap and Berger JJ.)

THE FACTS.—By a Führerverordnung (Decree of the Führer) dated July 28, 1942, during the German occupation of Norway, provision was made for the payment of maintenance to children born out of wedlock when the father was a German and the mother belonged to certain " Aryan " stock. The purpose was stated to be to further the " racially valuable Germanic inheritance ". A child, A., born to a Norwegian mother and a German father, a captain in the German army who had since been killed, belonged to this category of " racially valuable " children, and the office of the Reichskommissar (Children's Department) ordered that a sum of money should be paid into a special savings account in the Oslo Sparebank

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[1] This right is exercised by a Mixed Clemency Advisory Board consisting of representatives of the Occupying Powers and the Federal Republic of Germany.]

(Oslo Savings Bank) in the name of the child. The mother of the child, as its guardian, was informed by the occupation authorities and by the Bank, so that according to Norwegian law the money was legally transferred to the infant.

Apparently, the money paid into the Oslo Sparebank was taken by the Germans from the Bank of Norway as part of the cost of occupation and, therefore, if the payment was one which could not legally be charged to occupation costs, belonged to the Norwegian State. At the end of the occupation the Norwegian authorities therefore claimed that the money in A.'s account (as well as that in other similar accounts) should be repaid to the Treasury. The mother protested, claiming that the money had been legally transferred to her son and did not represent more than what any child born out of wedlock could demand as maintenance.

During the proceedings the question was discussed whether it was in accordance with international law for the Occupying Power to legislate in the field of family law or whether this field was not completely reserved for the national authorities.

Held: that the property in the money had passed to the child and it could therefore not be ordered to be paid into the Bank of Norway as part of the enemy-owned assets in Norway.

Two only of the Judges dealt with the question whether the Decree of 1942 was or was not contrary to international law. Gundersen J. said (in part) as follows: " It can hardly be denied that an Occupying Power during a long-drawn-out occupation may have to face a situation where, in order to protect order and the public life in the country, it will need to spend money for purposes outside the framework of the peace-time budget of the occupied country. This may be the case even if, in accordance with the Hague Regulations, it respects as far as possible the laws of the country. But this in itself, or the fact that it spends the resources of the occupied territory for the expenses of the occupying army, cannot justify the liberated State in appropriating from individuals monies which the Occupant paid in the exercise of his rightful competence and which are still intact and identifiable. Neither international law nor unwritten municipal law can authorize this—and it had not been claimed that any written law justifies it. I need not discuss whether any such written rule could have been enacted.

" I come now to the next question: Was the German Decree concerning the maintenance of illegitimate children a violation of international law? The plaintiff has in this regard referred to an opinion of Professor Dr. Frede Castberg, from which I quote:

" ' It is evident that the Occupying Power must to a certain extent exercise discretion in deciding what is necessary for the administration of the occupied territory and for the military occupation. In my opinion it is reasonable to regard as justified for these purposes such matters as the payment of compensation for damage caused to the local population, the making of social security provisions for persons who have a permanent connection with the army of occupation, the personnel of the administration, etc. The Führerverordnung which is the basis of the account of A. in Oslo Sparebank seems to be perfectly unassailable apart from the extremely tasteless additional purpose which it proclaims, namely, to further the so-called "racially valuable Germanic inheritance". But this typically National-Socialist racial discrimination is not material in connection with the present case. The provision of a reasonable degree of social security for a Norwegian mother of an illegitimate child cannot be illegal just because another Norwegian mother would not have benefited from the same treatment if she had been of Jewish race.

" 'To charge the expenses of relief for such women to the general cost of the occupation cannot be a violation of international law in regard to Norway [merely] because Norwegian national opinion rightly condemned sexual intercourse with German soldiers and officers.'

" On the whole I agree with Professor Castberg. It is perfectly possible that leading German National-Socialists had a 'higher' aim in view with regard to this particular provision for maintenance. But that is not decisive in this case. In National-Socialist Germany there was a tendency to give even the most practical and prosaic measures a superstructure of propaganda which was to a greater or lesser extent repulsive. This measure of social security is no exception. But the real purpose of the measure is seen from the letter from the relevant German authority in Norway: the occupying force undertook for the duration of the war to pay such maintenance as German fathers in normal times would have had to pay. I cannot see that the occupying authorities have, by this measure and by charging the cost to relevant occupation expenses, so exceeded their freedom of action that we must hold that the payments effected on this account were illegal. . . ."

Kruse-Jensen J. reached the opposite conclusion. He said: "For me it is quite clear that Hitler's 'Verordnung über die Betreuung von Kindern deutscher Wehrmachtsangehöriger in den besetzten Gegieten' of July 28, 1942, is a violation of positive international law.

" Under Article 43 of the Hague Rules [Regulations] of 1907, the Occupant must take all steps in his power to re-establish and ensure, as far as possible, public order and safety. This rule was already established by customary law. It is furthermore stated that the Occupant shall exercise this power 'while respecting, unless absolutely prevented, the laws in force in the country'. The Regulations provide in Article 53:

> 'An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for operations of war.'

"Having regard to these provisions, I find it doubtful whether the Occupant is entitled, without coming into conflict with international law, to effect any alteration in the family law of the occupied country, including [especially] the social protection of illegitimate children, when it is clear that the national legislation in this field may be regarded as satisfactory for the purpose. Such was and is the case in Norway and presumably also in the Netherlands. But it must be fairly obvious that the Occupant cannot claim that the kind of legislation represented by the Decree of 1942 should be accorded international recognition. This must be so even if one accepts as a general presumption for the interpretation of the Hague Rules that it was not intended to introduce any significant limitations on the factual power of the army of occupation.

"The first paragraph of the Decree provided that special protection and help shall be accorded to children of German personnel of the armed forces and Norwegian or Netherlands women in the occupied territories in order to further and protect the racially valuable inheritance. Such special protection is given by the Reichskommissar at the request of the mothers concerned. In the second paragraph, the special care for these children is defined, and it is added: 'Further details to be fixed by the Reichskommissars for Norwegian and Netherlands territories.'

"I cannot fail to draw the conclusion that the Occupying Power has by this provision, in furtherance of certain special political purposes, effected a special discrimination against certain parts of the population, and this is in violation of international law which, as mentioned above, limits the rights of the Occupying Power to such measures as are necessary to restore and ensure public order and safety, and provisions necessary for operations of war.

"International law clearly requires that the Occupying Power, when instituting, *e.g.*, food rationing, is bound to do so justly and honestly without any discrimination on account of race, nationality, creed or political opinion. It must also, as mentioned above, respect the laws of the occupied territory unless absolutely prevented. These general considerations, which are binding on the Occupying Power even where there is no question of vital necessity, are in my opinion violated by the Decree of 1942. In contradistinction to the learned Judge who gave the first vote, I find that the main purpose of the Decree is to further the so-called racially valuable German inheritance—and not to effect a reasonable solution of certain problems which always arise during an occupation. I refer again to the actual wording of the Decree in connection with what I have previously said, and I also draw attention to the highly significant fact that it deals only with Norwegian and Netherlands children, and not, for instance, with Czechoslovakian, Belgian, Polish or others. The political aim which is the main purpose of the Decree is thus in my opinion: special care for children belonging to the Germanic 'race', to the exclusion of other children, *e.g.*, Jewish children. This is manifestly contrary to our legal and ethical conceptions. Furthermore, it must, according to available evidence, be deemed superfluous for the purpose of furthering the military operations of the army of occupation or to secure and restore public law and order, because there already existed satisfactory social legislation. The Decree must therefore be set aside as invalid. It is true that the Occupant must be granted a certain discretion to decide what is necessary in order to restore and ensure peace and order, etc.; but that is without importance for the result I have reached in this case. . . ."

[Report: *Rt.* 1956, p. 36.]

NOTE.—This case was decided by reference to municipal law since the majority of the Court did not find it necessary to decide whether the Decree in question was or was not in accordance with international law. However, the observations of Judges Gundersen and Kruse-Jensen are of a relevance transcending that of mere *obiter dicta.* Judge Gundersen held that the Decree was in conformity with international law; for him this was the decisive issue in the case. For Judge Kruse-Jensen, the view that the Decree violated international law was the decisive factor.

Belligerent Occupation—Administrative Functions of Occupant—Appointment of Judges in Occupied Territory—Judges Appointed by Soviet Authorities in Eastern Germany—Recognition of Judgments in German Federal Republic.

RECOGNITION OF DIVORCE (EASTERN GERMANY) CASE.

German Federal Republic, Federal Supreme Court. November 14, 1956.

THE FACTS.—Shortly after the occupation of eastern Germany by the armed forces of the Soviet Union, the local Soviet commander appointed a Judge to exercise jurisdiction in cases previously within the competence of the local German court. The Judge so appointed had the legal qualifications required by German law, and in the course of the performance of his official functions he dissolved a marriage between parties resident in his judicial district. It was contended that the divorce decree pronounced by him was not entitled to recognition in the German Federal Republic.

Held: that, notwithstanding that the Soviet Union did not consider itself bound by the Hague Regulations of 1907, the appointment of judges by an Occupying Power was in accordance with customary international law, and that accordingly the decree pronounced by a Judge appointed by the local commander of the armed forces of the Soviet Union was entitled to recognition in the German Federal Republic.

The Court said: "As a result of the special circumstances created by the occupation of Germany by foreign armed forces, and in particular as a result of measures taken by the Occupying Powers, the former German courts were dissolved and their jurisdiction ceased. It must therefore be considered as legally admissible that foreign commanders appointed new judges and changed the structure and competence of the courts, provided that the exercise of jurisdiction, the independence of the judiciary and regular legal procedure remained intact. This follows from the provisions of the Hague Regulations. The Soviet Union does not consider itself bound by these Regulations, but to a very large extent they represent a codification of generally recognized rules of customary international law. They are therefore binding on all States, even without express acceptance. The question whether the Allies pursued wider aims than occupation, and in particular whether they were intent upon intervention, is immaterial because intervention cannot abrogate general international law. This Court has repeatedly affirmed the applicability of the Hague Regulations, more especially with regard to the territories to the east of the Oder-Neisse line. The disappearance of a German Government and the cessation of hostilities are immaterial as far as the applicability of the Hague Regulations is concerned, because the Hague Regulations are intended, above all, to ensure the protection of the population of occupied territory. According to Article 43 of the Hague Regulations the Occupant, once legislative power has in fact become vested in it, is under a duty to take all necessary measures to restore and maintain public order and the life of the community, as far as possible. This must be done by observing local law unless insurmountable obstacles prevent the application of such law. It is generally recognized—and it has repeatedly happened, as, *e.g.*, after the occupation of Poland in the First World War, when the local judges had fled—that the measures to be taken in pursuance of Article 43 of the Hague Regulations include those in the field of judicial administration, and in taking these measures the Occupant is not required to allow the former judges to remain in office. The findings of the Court of Appeal show that the rules of international law codified in the Hague Regulations were observed in this case. The Court which was set up was to function as an independent court under the direction of a lawyer who satisfied the requirements of German law.

[The Court then elaborated this aspect of the case and continued:] "The fact that the Court was possibly established by order of the local commander, and not by order of the Commander-in-chief of the zone, does not cause the appointment to become invalid. The Hague Regulations do not restrict the powers of a local commander in this way. This is apparent from Articles 51 and 52 of the Regulations, which contain express exceptions for special cases. 'Occupant' within the meaning of Article 43 of the Regulations is the commander who is in command of the occupied part of the territory."

The Court then considered the relevant facts and held that the local commander had made the appointment within the limits of his local competence. Lastly, the Court rejected the contention that the appointment of the Judge was invalid because it had not been published. The Court was of opinion that all that was required was that the appointment had come to the notice of the parties.

[Report: NJW, 10 (1957), p. 222.]

Belligerent Occupation—Administrative Functions of Occupant—Continuing Operation of Order of Occupant after Occupant's Departure—Competence of Courts of Formerly Occupied Country to Rescind Order—The Law of Austria.

REQUISITIONED FLAT (AUSTRIA) CASE.

Austria, Federal Constitutional Court. June 30, 1956.

THE FACTS.—In 1945, while Vienna was occupied by the armed forces of the Soviet Union, the Soviet military authorities requisitioned the appellant's flat in Vienna. In 1947 the local commander of the Soviet armed forces released the flat and instructed the Austrian housing authorities to let one F. into possession (this being a condition of release of the flat from requisition). The appellant thereupon applied to the housing authorities for possession of the flat. She did so at a time when Austria was still occupied, and the application was dismissed on the ground that the Austrian authorities were not entitled to rescind an order of the Occupying Power. When the appeal against this decision was heard Austria was no longer an occupied country, but notwithstanding this change in the legal status of Austria the Austrian Ministry of Social Administration dismissed the appeal, holding that it was not entitled to consider its merits because the subject-matter of the appeal was an order of the former Occupying Power and not an order of the Austrian authorities, and that, in any event, the orders of the former Occupying Power had automatically lapsed on the latter's departure from Austria.

Held: that after the end of the occupation of Austria the Austrian authorities regained the right to rescind orders of the former Occupying Power where the merits of the case justified such rescission. In the present case the merits justified such rescission and, as the Ministry had failed to consider the merits of the appeal, the appellant was entitled to succeed.

The Court said: " It is true that on the date when the City of Vienna had to determine this application, *viz.*, on October 16, 1954, it was bound by the order of the Occupant and was not entitled to enquire into its legality. However, on the date when the Ministry gave its decision on appeal, the occupation of Austria had already ceased, and the Ministry was under a duty to take judicial notice of this fact. It was therefore under a duty to rescind the order which gave F. possession of the appellant's flat because that order was contrary to law. The Ministry takes the view that it was not entitled to do so, having regard to the jurisprudence of the Constitutional Court (which precludes the Austrian authorities from enquiring into the validity of orders of the Occupant). This view, however, is erroneous. The reason why the Austrian authorities were bound by orders of the Occupying Powers was factual, and not legal. The binding force of such orders therefore ceased with the departure of the Occupant. From then onwards the right to let tenants into possession of land became exclusively subject to Austrian law, and it had to be considered in the light of that law and as entirely divorced from the powers of the Occupant.

"No special enactment was required to vest in the Austrian authorities the right to adjudicate upon matters originally based on an order of the Occupying Power. The contrary view of the Ministry would lead to the result that such orders which cannot be reconciled with Austrian law would be unalterable, a result which would be diametrically opposed to the reconstitution of the sovereignty of Austria provided for in Article 1 of the Peace Treaty [of May 15, 1955], and which must therefore be rejected.

"Finally, it is not true that the rescission of the order is not required because the orders of the Occupying Powers lost their force when their power to issue orders came to an end. In expressing this view the Ministry apparently means to say that the appellant is now free to assert her unrestricted right of ownership by recourse to remedies provided by civil law (as distinct from constitutional law). Against this argument it may validly be asserted that the person now in possession of the flat would be entitled to rely on the decision of the City of Vienna, which cannot be questioned by the civil courts and which must be obeyed until it is rescinded by the competent administrative authority. It is the duty of the Constitutional Court to have regard to all these factual and legal considerations. It must therefore proceed from a finding that the factual obstacle of the occupation of Austria, which previously stood in the way of the application of Austrian law, has now been removed. The Ministry would have been under a duty to determine the appeal on the merits. As it has refused to do so, the appellant has been deprived of her right to recourse to the lawful judge. The decision under appeal must accordingly be quashed as being unconstitutional."

[Report: Vf GH, Judgment No. 3042.]

Belligerent Occupation—Legislative and Administrative Functions of Occupant—Payment of Debt to Enemy Property Custodian—Legal Effect of—The Law of the Philippines.

ESTATE OF ROHDE *v.* ESTATE OF URQUICO *ET AL.*

Philippines, Supreme Court. October 10, 1955.

THE FACTS.—This action sought a judgment by the Court of first instance that a debt owed to William Rohde by Manuel Urquico had been extinguished by payment to the Enemy Property Custodian of the Imperial Japanese Army in October 1944, and that the certificate of title which was issued on the basis of that payment and which covered real property mortgaged to Rhode as security was null and void. Rohde, who died in 1945, had been a national of the United States residing in the Philippines; the estate of his wife and heir was the plaintiff in this action. Joined as defendants were the estate of Urquico and the purchasers of the real property in question. The Court of first instance held that the payment to the Enemy Property Custodian had not extinguished the debt and that the property continued to be subject to the mortgage. The defendants appealed.

Held: that the judgment must be reversed. The payment to the Enemy Property Custodian was binding on the creditor.

The Court said: " As regards the validity of payment made to the Enemy Property Custodian we need not go into a detailed discussion of that legal point. The recent case of *Hodges* v. *Gay et Al.* (48 *Off. Gaz.*, No. 1, p. 136), is directly in point. The facts are briefly as follows: defendant Gay had a mortgage indebtedness of ₱41,663.50 to C. N. Hodges payable on or before June 3, 1942. When the war broke out Hodges left his residence in Iloilo and evacuated to the mountains of Panay until March 20, 1944, when he escaped to the United States, returning to the Philippines only after Liberation. In the meantime, on March 15, 1944, without the knowledge and consent of Hodges, Gay paid the indebtedness to the Office of the Enemy Property Custodian with Japanese military notes whereupon a certificate of cancellation was issued in favor of the defendant. The property mortgaged was later sold to other parties. On October 19, 1945, Hodges filed an action in Iloilo to annul the deed of sale of the property mortgaged to him and to recover the amount of the indebtedness from Gay. The trial court decided in his favor. On appeal to this Tribunal we held that, applying the doctrine laid down in the case of *Haw Pia* v. *China Banking Corporation*,[1] the payment made by Gay to the Enemy Property Custodian was valid and extinguished the mortgage debt and that the voluntary payment made to the Enemy Property Custodian was immaterial since the decisive consideration was that

[[1] See *International Law Reports*, 1951, Case No. 203.]

the Japanese military authorities through the Enemy Property Custodian were authorized to receive payment in the name of Hodges under Article 1162 of the Civil Code.

"On the basis of our decision in that case of *Hodges* v. *Gay*, *supra*, we have to reverse the decision of the trial Court. We repeat that inasmuch as the Enemy Property Custodian was an entity authorized by law to receive payment of an indebtedness due to enemy aliens, under Article 1162 of the Civil Code, the payment was valid and bound the creditor."

(Padilla J. dissented without opinion, citing his dissenting opinions in prior cases.[1])

[Report: *Official Gazette*, 52 (1956), p. 2003.]

Belligerent Occupation—Legislative and Administrative Functions of Occupant—Currency Issued by Occupant—Payment of Debts in Occupation Currency.

SINGSON *ET AL.* *v.* VELOSO *ET AL.*

Philippines, Court of Appeals. October 14, 1955.

THE FACTS.—This was an action for partition and accounting brought by a group of co-owners of two parcels of real estate against the administratrix and other co-owners. The Court of first instance decreed a partition and made certain orders regarding the accounting for the rent. The plaintiffs appealed from these latter orders. Among the allegations of error was the refusal of the Court to reduce, on the basis of the Ballantyne schedule, the allowance for a payment on account in Japanese currency in September 1944.

Held: that the Court was correct in refusing to apply the Ballantyne schedule in the circumstances.

The Court said: "There is no merit in the further contention of plaintiffs-appellants that the ₱1,417 in Japanese military notes paid on September 6, 1944, should be reduced to Philippine pesos according to the Ballantyne schedule of monetary values. It has been held by the Supreme Court that payment made in Japanese money for obligations contracted before and during the war was valid and extinguished such obligations (*Haw Pia* v. *China Banking Corporation*,[2] G.R. No. L-554, April 9, 1948)."

The judgment appealed from was modified by the Court of Appeals, however, with regard to certain other allegations of error not connected with this question.

[Report: *Official Gazette*, 52 (1956), p. 870.]

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[1] *Haw Pia* v. *The China Banking Corporation* (*International Law Reports*, 1951, Case No. 203); *Del Rosario et Al.* v. *Carlos Sándico et Al.*, and *La Orden de Padres Benedictinos de Filipinas* v. *Philippine Trust Co.* (cited *ibid.*, Note, at p. 661).

[[2] See *International Law Reports*, 1951, Case No. 203.]

Belligerent Occupation—Administrative Functions of Occupant—Postal Administration of Occupant—Clearing of Debts of.

See p. 591 (*Re Dues for Reply Coupons Issued in Croatia; Re Transit Charge for Mails from Occupied Yugoslavia*).

Belligerent Occupation—Functions of Occupant—Purported Conferment of Independence on Burma by Japanese Occupation Authorities.

See p. 787 (*Chettiar* v. *Chettiar*).

iii.—Respect for Private Property. The Public Property of the Enemy State. Requisitions and Contributions

Belligerent Occupation—Respect for Private Property—Duty of Occupant to Pay Lighthouse Dues to Private Concessionaire Operating in Occupied Territory—Ships Requisitioned by Occupying Power—Whether Exempt from Dues—Whether Equivalent to Warships—Definition of " Warships ".

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claim No. 1 (*First Part*).

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *supra*, p. 659). In the course of the military occupation of Turkish territory by Greece during the Balkan Wars of 1912 and 1913, the occupation authorities refused to pay lighthouse dues in respect of ships requisitioned by Greece. Relying on the exemption in the lighthouses concession of " warships properly so-called ", the Greek Government contended that requisitioned vessels would be assimilated to warships and thus exempt from dues.

Held: that the claim must succeed. Requisition of privately-owned ships did not of itself convert them into warships: it was necessary that they also be devoted to the same purposes as warships. As Occupying Power, Greece was bound to pay the lighthouse dues lawfully demanded by the concessionaires.

The Tribunal said: " In this case also (like that of [*Claim*] *No.* 8[1]) the question is one of a claim which arose during the period of military occupation, but which continued in dispute between the parties after the substitution of the territorial sovereignty of Greece for the régime of military occupation. This claim concerns the default, or refusal, of the Greek authorities in paying the lighthouse dues demanded by the firm of Collas & Michel in respect of ships requisitioned by Greece. The Tribunal will deal with the claim at

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[[1] See *infra*, p. 806, and *supra*, p. 79.]

this point only so far as it refers to the period during which Greece was acting as a belligerent Power and before her subrogation in the rights and obligations of the concession as successor State to the former Ottoman Empire. A number of the considerations which apply to the earlier period are equally valid for the later period, during which Greece continued to refuse payment.[1] In this matter also, the attitude of Greece was inconsistent. At first, she regarded it as natural to pay, even for the ships in question, those lighthouse dues which were payable and she quite clearly recognized this obligation to pay. Later on, however, she began at first to create delays, then to make reservations, and finally she simply refused payment. In this last phase, which occurred in the second period, the Greek Government relied on new juridical arguments which consisted of declaring that no vessel which it had requisitioned should be liable to pay, because all such vessels would be assimilated to warships, exempt under the concessionary contract from the payment of lighthouse dues.

"In the period which preceded the acquisition by Greece of territorial sovereignty—August 25, 1913, December 19, 1913, February 13, 1914, or August 6, 1924, respectively, according to the analysis given above, in the introductory part of this award,[2] for the different parts of New Greece—the Greek Government could obviously not yet invoke its position as grantor State by subrogation, a position which it did not yet occupy. In this initial period, it could only invoke, like any other shipowner, whether State or private enterprise, the clauses of the tariff in force in the Ottoman Empire, and claim, like any other State, the exemptions expressly mentioned in that tariff, according to their interpretation in Turkey. No more than the grantor Ottoman Government itself could the Greek Government, either as an operator of ships or as a sovereign Power, claim exemption beyond those limitatively defined in the tariff in force in the Ottoman Empire. What the Ottoman Government itself, and, moreover, every other Government, allied or neutral, which sent ships under its flag into Turkish waters, had to pay to the firm of Collas & Michel in accordance with the conditions of the legal tariff granted to it, the Greek Government also had to pay. And neither its capacity as occupying Power of a part of Ottoman territory, nor that of enemy Power in general, exempted it from the payment of lighthouse dues lawfully payable to a French concessionaire. As occupying State in particular, Greece ought to conform to the rules governing the administration of the concession and incorporated in the municipal legislation of the occupied State. Seen from this point of view, the claim should, even for the period of occupation, be judged in the light of the conditions of the tariff granted to the concessionaire firm and of a reasonable interpretation of its terms.

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[1] [See *supra*, p. 341.]

[2] [See *supra*, at p. 665.]

" The Tribunal has already given some indication of its opinion on this point in general terms in its Procedural Order No. 4[1] and it must now express itself at greater length on this dispute, which has become more and more lively in the course of years.

" Exemptions from light dues are set out in paras. 5 and 6 of Article XIV of the concession of August 8/20, 1860 (which was still in force in 1912):—

> " ' (5) Warships shall be exempt from the payment of lighthouse dues in all parts of the Empire throughout the duration of the concession.
>
> " ' (6) It is understood that this exemption from dues is accorded only to warships properly so-called; it does not apply either to subsidized or privileged companies or to State-owned vessels engaged in postal, commercial or other similar services.'

It appears from the terms of para. 5 that the clause relating to the exemption of warships operates as an exception to the general rules contained in the preceding paragraphs. This circumstance itself calls for circumspection in its application. But there is more: the next paragraph, (6), proclaims in express terms that the exemption clause applies only to warships ' properly so-called '. The clarity of the conclusion to be drawn from these two indications of the restrictive nature of the exemption appears, at first sight at least, to be lessened by the following clause which, by means of an argument *a contrario*, appears to have the effect of extending, on the contrary, the scope of the expression ' warships properly so-called ' to vessels which are not at all, in the strict sense of the word, warships. Thus, it could be argued, if it was thought necessary to stipulate in express terms that the exemption from lighthouse dues should not be applicable either to subsidized or privileged companies or to State-owned vessels engaged in postal, commercial or other similar services, did not that mean that without the explanatory clause the two special groups of ships mentioned could also be included in the category of warships?

" The Tribunal is not convinced by this reasoning. If it has at first sight a logical appearance, it does not retain it if one considers, on the one hand, that a clause as clear as that which limits the exemption from lighthouse dues to warships properly so-called can be invalidated only by a clause equally clear and unambiguous, and, on the other hand, that it is perfectly possible to interpret the said reference to the two special groups of ships mentioned in the second part of para. 6 in such a way as to explain it without in the least affecting the preceding clause. In fact, a warship of the

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[1 Made June 2, 1955, which called for details of the purpose and effect of the requisitioning of ships, *e.g.*, for use as auxiliary cruisers, hospital ships, transport of troops, munitions or supplies, etc.]

normal kind is characterized above all by its being actually devoted to the military purposes of war. It is quite understandable that those who drew up the concessionary contract of 1860 meant to accentuate this characteristic of a warship by contrasting with it—basing themselves on the factual situation existing at that time—two other types of ships which certainly were not warships. That is why they added that neither a vessel which can virtually be used as a battleship only in case of urgent necessity, but without being actually used as such (as is the case with the auxiliary cruisers of the 'voluntary fleet', constructed contingently in advance with the object of possible use for military purposes by means of their conversion from merchantman to warship) nor a ship which, although a State owned vessel, is not intended for use in military operations but for other public services (for example, a mail boat, a customs vessel, a police or quarantine vessel, etc.)—can be regarded as warships. Interpreted in this way, the additional clause, following immediately on that which relates to warships properly so-called, is perfectly understandable.

"The Tribunal also considered whether there was any reason to interpret Article XIV (5) and (6) in the light of certain definitions of 'warships' which have been devised at one time or another in the distant or recent past with various objects, but it reached a negative decision. All these definitions, indeed, differ notably among themselves because their content is connected with the object which they pursue, according as the concept of 'warship' has to be defined, for example, for the purpose of the exercise of the right of capture or other warlike activities or for defining the ships which may be the object of such a right, for determining which ships flying the flag of a belligerent State may enter a neutral port, or for enumerating the vessels which will enjoy a right of immunity in foreign waters, or which may exercise a right of surveillance on the high seas, etc. Thus, for example, the definition given in Article 10 of the Resolutions of the Institute of International Law issued at Stockholm in 1928[1] on the status of seagoing vessels and their crews in foreign ports in time of peace, which includes warships in a stricter sense along with other ships under the denomination of auxiliaries and with hospital ships, in a more general category, termed 'military vessels'. Such a definition, drawn up in 1928 for the special purpose mentioned, does not permit the drawing of any conclusion relative to the true meaning of a clause in a concessionary contract drawn up in 1860 to reserve, on the one hand, for Ottoman warships a special exemption from lighthouse dues, but guaranteeing, on the other hand, to concessionaires who were about to engage in heavy expenditure for the construction of public works a strict interpretation of the exemption clause so as to exclude possible abuses of it in the future.

[1] *Annuaire*, vol. XXXIV, pp. 736 *et seq.*

"If reference has to be made to an authoritative precedent taken from the history of this head of public international law, it should be made rather to the fact that, during the Second Peace Conference of 1907, Great Britain proposed that what were called 'auxiliary vessels' should be regarded as warships, and that this proposal did not meet with much support and was withdrawn. By this special category of 'auxiliary vessels' was understood particularly merchant ships, belligerent or neutral, employed for the transport of troops, munitions, supplies, etc., or for the transmission of communications, and being under the command of the belligerent fleet.[1]

"The Tribunal has similarly, in its Procedural Order No. 4,[2] given an indication of the juridical consequences which it draws from its finding in regard to the meaning of the expression 'warships properly so-called' in connection with the special category of ships requisitioned by a State in time of war or in anticipation of imminent hostilities. Such a requisition does not in itself convert into warships privately-owned merchant ships or private packet-boats; these pass into that category only by being devoted to the same purposes as warships. Conversely, the mere fact that a ship remains private property does not suffice to deny to it the character of warship, once, and so long as, it is capable of participating in warlike operations. The transport of troops, munitions or supplies, evacuation operations, hospital services, etc., do not turn such vessels into warships properly so-called, although ships devoted to those services can, 'as auxiliary ships', under certain conditions be made subject to the same rules as battleships, which alone are true 'warships properly so-called.' The restrictive interpretation given above to the expresssion 'warships properly so-called' squares, moreover, with the interpretation given to it by Turkey herself, by foreign governments and by the Allied High Commissioners at the time of the occupation of Constantinople in 1922. It also squares with the attitude initially taken by the Greek authorities.

"The Greek Government cannot therefore render ships requisitioned by it entitled to the benefit of the exceptional treatment reserved to warships properly so-called by 'assimilating' them to the latter or by 'enrolling' them in the Navy—a procedure which would also seriously disturb the equilibrium of the concession.

"The consequences of this analysis of Claim No. 1 will be determined subsequently[3] with reference to the same claim for the period following the transfer of territorial sovereignty to Greece."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 88.]

[1] *Acts*, vol. III, pp. 1135, 847, 862 and 917.

[[2] Made June 2, 1955, which included the following recital: "Whereas the mere requisition of a privately-owned vessel cannot confer upon it the character of a warship properly so-called, but that that character cannot be denied to a privately-owned vessel requisitioned and converted into a warship . . ."]

[[3] See *supra*, p. 341.]

Belligerent Occupation—Respect for Private Property—Seizure by Occupant of Lighthouse Dues Collected by Concessionaires —Whether Public Enemy Property—Article 53 of Hague Regulations, 1907—Whether Part Due to Occupied State is *Valeurs exigibles*—Relevance of Fact that State's Part Not Ascertained—Relevance of Fact that State's Part Previously Pledged to Creditors.

LIGHTHOUSES ARBITRATION BETWEEN FRANCE AND GREECE.

Claim No. 8 (*First Part*).

Permanent Court of Arbitration. July 24, 1956.

(Verzijl, President; Mestre, Charbouns.)

THE FACTS.—(See *supra*, p. 659.) When the Greek forces occupied Salonika in 1912, they proceeded straightaway to seize everything which they thought they were lawfully, that is, under the laws of war, entitled to seize as public enemy (*i.e.*, Ottoman) property. They regarded as such the cash and the proceeds of the collection of light dues, which they threatened to seize accordingly. The firm of Collas & Michel at once contested the legitimacy of the proposed seizure and invoked the intervention of the French Legation at Constantinople. This intervention brought about a *modus vivendi* under which the takings received by the firm at Salonika in the operation of the concession were to be provisionally paid into the Greek Treasury and regarded as a deposit account, after deducting the actual expenses of the maintenance, etc., of the firm's lighthouses. This provisional *modus vivendi* expressly provided for a settlement of final accounts, but that settlement never took place, not even after the Salonika region was definitely assigned to Greece on August 25, 1913. On the contrary, the Greek authorities continued after that date to require the payment of receipts into their bank account at Salonika and all monies thus deposited remained definitively in the hands of the Greek Treasury, despite repeated applications by Collas & Michel. The firm now claimed repayment of these monies. The Tribunal here dealt only with monies paid to the Greek Treasury down to August 25, 1913; its findings with regard to monies paid after that date are reported elsewhere in this volume.[1]

Held: that the claim must succeed. The lighthouse dues were improperly seized. They were not public enemy property as was alleged; they were the property of the concessionaires. Nor were they " taxes, dues, and tolls imposed for the benefit of the [occupied] State". Even though part of the dues was ultimately payable to Turkey, that part could not be seized until it was ascertained; still less could the whole of the dues be seized by the Occupying Power. In any event, that part had been pledged to creditors of Turkey.

The Tribunal said: " This claim is a typical example of the claims which arose during the Balkan Wars of 1912 and 1913. The facts on which the claims are based appear simple enough, but the juridical appreciation of them is not. . . . The aspect of the dispute as it was presented in the light of the legal situation after August 25, 1913, will be examined below.[1] For the moment, the Tribunal will confine itself to the juridical situation during the period of military occupation.

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[1] See *supra*, p. 79.

"The foregoing simple recital of facts raises certain questions of the law of war, of the juridical order of the concession and of the principles of law relating to respect for acquired private rights. According to public international law, a belligerent State which occupies the territory of the enemy may, on the one hand, take possession of the movable property of the enemy State set out in Article 53 of the Regulations respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV of 1907, and, under certain stringent conditions set out in Article 48 of the said Regulations, may collect in the territory occupied the taxes, dues and tolls imposed for the benefit of the State; but the Occupant must, on the other hand, respect private property (Article 46).

"Into which category do the cash and the takings in question fall? It is beyond question that lighthouse dues, when the service is maintained directly by the State, are by their nature dues imposed for the benefit of the State. In consequence, monies received from that source normally come within the category of property which may be seized and their collection by the occupying State is perfectly in order. It is otherwise in a case where the dues are collected under a concession granted by the occupied State to a private individual or to a firm or company. The nature of a concession is such that, in effect, the dues—although in the present case they were collected by the concessionaires in the name of the Ottoman Government (Article XIV *in fine* of the concession of 1860, which remained in force subsequently)—are in reality received for the benefit of the concessionaires, against the expenses to which they are put in respect of the construction, the maintenance and the working of the lighthouse and lights under the concession, and often charged with the payment to the granting Government of some part of the gross or net receipts But the lighthouse dues become in the first instance part of the property [*dans le patrimoine privé*] of the concessionaires and the part intended for the granting State forms a debt due by the concessionaires to the Treasury of that State. When, therefore, a belligerent is confronted with such a situation in a territory occupied by him, the monies collected themselves are, as against him, clothed with the character of private property.

"It follows that, in such a case, lighthouse dues received as such enjoy the protection of private property and that, in consequence, they are in no way liable to seizure by the occupying State, being

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[[1] See *supra*, p. 79.]

neither ' taxes, dues, and tolls imposed for the benefit of the State ' nor ' cash or funds which are strictly the property of the State '. It follows again that the occupying State would not be entitled to seize the portion due from the concessionaire to the occupied State, unless that part, ascertained by a simple calculation of indebtedness, does not come within the conception of ' realizable securities [*valeurs exigibles*] ' mentioned in the first paragraph of Article 53 of the [Hague] Regulations of 1907 . . . among property of which alone possession can be taken. Now, this legal question is not easy to solve in the case before us. In effect, the lighthouse dues are collected in different places and only when they are totalled up do they comprise the receipts on the basis of which is calculated the part which goes to the granting State. Local receipts, then, have not, in principle, any part to play in this system; it cannot be said that the granting State has the right, in every place where the taxes are collected, to the part of the monies received which is described in the concessionary contract as part of a total sum. The ' securities ' of this special kind, even understood as including credits of this nature, cannot be called ' realizable ', inasmuch as they have not been fixed at an ascertained amount as the result of a calculation and drawing up of complete accounts. It is true that, in the case of the concession of 1860, the part accruing to the State is ascertained by reference to the gross receipts, but according to Article XII (maintained in force under the contracts extending the concession) a provisional payment is to be made out of the gross takings pending the agreement of the final total of possible damage caused to the property of the concessionaires by any case of *force majeure* and before any division of those takings between the Government and the concessionaires. And if the occupying State has, in consequence, no right to appropriate without more, by a taking of possession within the meaning of Article 53 of the [Hague] Regulations of 1907, a part of the local receipts corresponding to the total percentage stipulated in the concessionary contract, it has, *a fortiori*, no right to appropriate the total, even after deducting the cost of maintaining the lighthouses.

" One might ask whether an occupying Power had the right of appropriating credit balances due to the occupied State, which are not yet either ascertained or payable, against the time when they should become both during the occupation or after the military occupation has become territorial sovereignty. Arguments in the affirmative sense are not lacking, despite the tendency of the Regulations of 1907 to limit strictly the powers of the Occupant. But there is no need to insist on this point, because in the present case a reason of quite a different kind prevents the acceptance of such a solution.

" The Tribunal will show more fully in part II of this award—

in connection with the Greek *Counterclaim No.* 1[1]—That the part belonging to the Ottoman State had for a long time been not only pledged, but alienated in advance to a group of creditors by a contract under which the firm of Collas & Michel had received from the Ottoman Government an order to pay the part of the receipts belonging to the latter, not to the Ottoman Treasury but to a representative of the creditors. There is no doubt, therefore, that that part of the receipts which was alienated by Turkey must enjoy the protection accorded to rights acquired by private individuals, and that Greece, as occupying Power, had no right to appropriate it. *A fortiori*, she had no right to seize the whole of the takings, even after deducting the expenses of operating the lighthouses.

"The share of the receipts which belonged to the grantor State having been paid in full by the firm to the creditors, as appears from a declaration dated July 19, 1956, made by the latter, to which the Tribunal will refer again when examining Counterclaim No. 1,[2] Greece must repay to the firm the whole of the monies paid by it to the Greek Treasury under the above-mentioned *modus vivendi* down to August 25, 1913."

[Report: *Protocoles des Séances, etc.* (*Affaire des Phares*), p. 85.]

Belligerent Occupation—Right of Occupying Power to Immovable Property—Hague Regulations, 1907—Article 55—Occupying Power as Mere Administrator and Usufructuary.

HUSSEIN BUKSH KHAN *v.* MUDALIA AND ANOTHER.

Burma, Supreme Court. July 9, 1952.

(E Maung, Myint Thein and U Aung Tha Gyaw JJ.)

THE FACTS.—The appellant obtained from the authorities administering the Rangoon Development Trust during the Japanese occupation of Burma a permit to occupy a piece of land, and build a house thereon. He let the house and land to the second respondent. After the re-occupation of Burma the administrator of the Development Trust assessed the respondents with encroachment taxes and later granted a lease for thirty years to the respondents, who filed a suit for declaration of title to the house and land. The trial Judge gave a decree as claimed. On appeal to the appellate side of the High Court, the decree was reversed and the house was declared to be the property of the appellants.

On further appeal, to the Supreme Court,

Held: that the appeal must be dismissed. The rights of the appellant under the permit came to an end with the ending of the Japanese occupation of Burma.

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[1] See *supra*, p. 94.]

[2] *Ibid.*]

The Court said: " Assuming everything in favour of the appellant, the permit which was granted to him by the authorities administering the Rangoon Development Trust during the Japanese occupation of the City of Rangoon could not give him any title to endure beyond the period of such occupation as against the Rangoon Development Trust. Article 55 of the Hague Regulations of 1907 makes the occupying State only an administrator and usufructuary of land belonging to the State of the occupied country and the authority of the occupying State does not extend beyond the period of occupation. It was clearly open to the authorities of the Rangoon Development Trust after reoccupation of Rangoon by the local Government, to oust a person who held lands belonging to it under a grant of, or permit by, the authorities appointed by the occupying State to administer its lands during the occupation. To such a person the lawful administrators of the Trust owed no duty of any kind and when on the 11th June 1946 the respondents were treated by the Rangoon Development Trust as permissive occupiers and were charged encroachment rent as from the third quarter of 1945–46, any right which the appellant might have had under the original permit during the Japanese régime and subsequent acquiescence by the lawful administrators of the Trust definitely came to an end."

[Report: B.L.R., 1952, S.C. 146.]

Belligerent Occupation—Requisition of Private Property—Article 53 of Hague Regulations, 1907—Seizure of Oil Installations—Crude Oil—Whether Constituting *" Munitions de Guerre "*—Interpretation of Hague Regulations in Light of Changed Conditions of Warfare Since 1907—Nature of Title Acquired by Occupant—Whether Occupant Can Acquire Title in Crude Oil by Specification—Acquisition of Title in a War of Aggression—Maxim *Ex Injuria Jus Non Oritur*—Inter-Allied Declaration of 1943 Concerning Spoliation by Enemy Powers—Whether Amounting to a Treaty.

N.V. DE BATAAFSCHE PETROLEUM MAATSCHAPPIJ AND OTHERS *v.* THE WAR DAMAGE COMMISSION.

Singapore, Court of Appeal. April 13, 1956.

(Whyatt C.J.; Mathew C.J. (F.M.), Whitton J.)

THE FACTS (as stated by the Court).—" The appellants are three oil companies, incorporated in Holland, who prior to the outbreak of the war with Japan in 1941, carried on the business of producers and refiners of oil in Sumatra. Between them, they held all the concessions in Sumatra and owned two large refineries in the Palembang area in the southern part of the island. The total number of concessions was 86 of which 61 were held by the first appellant, 2 by the second appellant and 23 by the third appellant. The earliest concession was granted by the Netherlands Indies Government in 1907, and thereafter concessions were granted at various dates for periods ranging from 40 years to 75 years, the last concession being granted in 1941. By the end of 1941, the appellants had established production in 32 oil reservoirs, as they are technically known, situated in various places in the concession areas as shown on a map produced at the hearing of the appeal. These oil reservoirs are geological structures enclosing the crude oil in its natural state and it was agreed by the parties that the oil does not escape from them except by means of bore-holes, or wells, drilled into the reservoirs from the surface. No detailed information was supplied as to the number of wells which had been drilled into the reservoirs by the appellants by the end of 1941 or as to the rate of production of the wells at that date but it may be inferred that production was on a substantial scale from the fact that the two refineries already referred to had a total capacity of 90,000 gallons per day. The position, therefore, at the outbreak of hostilities, was that the appellants were producing crude oil in commercial quantities from some 32 reservoirs under concessions granted by the Netherlands Indies Government which still had substantial periods to run, and were refining crude oil obtained from these reservoirs on a large scale in their refineries at Palembang.

" For the evidence of the events which occurred during the Japanese occupation, the parties were, of necessity, dependant upon the testimony of Japanese naval and military officers. The effect of this testimony, some of which was given orally, and some on affidavit, may be summarised as follows. When the Japanese armed forces occupied Sumatra, they immediately seized the appellants' installations in the field and also their refineries at Palembang because, as a Japanese naval officer, Admiral Watanabe, called by the respondents put it, ' oil was the most vital war material at that time, and personally I thought we started the war for the sake of the oil.' The installations had been badly damaged as part of the Netherlands Indies Government's denial policy, and the Japanese military authorities organized a special technical unit under military discipline to repair them. By the end of the first year of the Japanese occupation, they were all in working order again and crude oil was once more being extracted from the reservoirs and being processed in the appellants' refineries. The Japanese military authorities did not bring any new oilfields into production but continued to extract oil from the existing reservoirs throughout the period of the occupation. The oil so extracted, or at least a substantial part of it, was shipped as refined products, and sometimes as crude, to Singapore where it was kept in storage tanks, belonging in some cases to the appellants' associated companies, until eventually it was forwarded to various destinations in Malaya, Thailand, French Indo-China and Japan proper to meet not only military demands but also civilian requirements in those areas. The Japanese colonel in charge of the Shipping Department of the Petroleum Office in Singapore throughout the occupation estimated that 6,000,000 kilo-litres, or approximately, 1,200,000,000 gallons, of petroleum from the Sumatra oilfields were distributed during the war in this way from the Singapore 'relay storage point', as he called it, to military and civilian consumers in the southern theatre of war: he gave no estimate of the respective quantities allocated to military and civilian consumers. When the British landed in Singapore on the 5th September, 1945, they found in the storage tanks approximately 55,000,000 gallons of refined petroleum and 11,000,000 gallons of crude oil, all of which, as is admitted by the respondents, had been extracted from the oil reservoirs in Sumatra by the armed forces of the belligerent occupant, and, after refining at Palembang in the case of the refined products, had subsequently been shipped by them to the storage relay point in Singapore. The British military forces seized the petroleum stocks as war booty. Later, by an arrangement which the parties agree does not affect the issues in this case, the appellants were allowed to withdraw 20,000,000 gallons of refined and crude oil, leaving a balance of 46,000,000 gallons of refined products, which has been valued, by agreement between the parties, on the basis of the 1941 Gulf prices at $5,099,490, which is the amount claimed by the appellants in these proceedings."

The appellants contended that the petroleum was their property and not, as the respondents alleged, the property of the Japanese State, and in support of their contention they relied upon two broad contentions, first, that they had a valid title to the petroleum under municipal law, and, second, that they were never lawfully deprived of their title by the Japanese belligerent occupant. The appellants' claim had been dismissed by the Board constituted under the Singapore Essential Regulations, and from that decision the appellants brought this appeal.

Held: that the appeal must be allowed. The appellants had as complete a title to the oil *in situ* as it was possible for anyone to have during the period of concession, and the seizure and subsequent exploitation by the Japanese armed forces of the oil resources of the appellants were in violation of the laws and customs of war and consequently did not operate to transfer the appellants' title to the belligerent occupant.

Whyatt C.J., after having stated the facts, said: "It is against this background of facts that I now turn to consider the numerous issues of law which have been raised in this case. As I have already indicated, they fall broadly under two heads, municipal law and international law; but it would be wrong to suppose that this division represents a true dichotomy, and indeed the complexity and multiplicity of the arguments in this case may well be due, in part at least, to a tendency to treat the issues as belonging rigidly to one or other of these branches of the law. The substantial contest in this case is between the appellants and the respondents' predecessors in title, the Japanese belligerent occupant, who is an International Person, and therefore it follows that when their competing claims are considered under municipal law, there is inevitably introduced an element of international law in view of the international status of one of the claimants. One further preliminary observation requires to be made on a matter which likewise has increased the complexity and difficulties of this case. Counsel for the appellants objected that at the hearing before the Board the respondents had relied on the Netherlands Indies law relating to *specificatio* without pleading it in their defence. Counsel for the respondents, while not conceding that there was any duty to plead *specificatio* specifically, contended that in any case the appellants had not been taken by surprise as translations of the relevant passages of Netherlands Indies law on this subject had been furnished to the appellants long before the trial. He also complained, by way of *tu quoque*, that the appellants, for their part, had raised matters of Netherlands Indies law without pleading them properly but he did not make any formal objection on this ground. It is true that the pleadings of both parties in regard to Netherlands law were somewhat unsatisfactory, but after the lengthy hearings before the Board and before this Court, during which the numerous issues in this case have been fully and exhaustively canvassed by both sides, I do not think the shortcomings in the pleadings, such as they were, can be said to have caused substantial injustice to either party, and I, therefore, make no further reference to them in this judgment.

" At the outset of their argument, the appellants recognized that it was incumbent upon them to show a good root of title under municipal law to the oil in the reservoirs in Sumatra prior to the Japanese invasion. It might be thought that an issue of this kind would not raise controversial questions of law but in the present instance this proved not to be the case for the respondents strenuously maintained that under the municipal law of the Netherlands Indies, the oil in the reservoirs, far from belonging to the appellants, was a *res nullius* until it was seized *vi et armis* by the Japanese belligerent occupant. It, therefore, becomes necessary to examine in some detail the municipal law relating to the title to oil in Sumatra when it is existing in its natural state in reservoirs under the ground. The municipal law to be applied is, of course, the domestic law of the Netherlands Indies but since Netherlands Indies law is presumed to be the same as English law unless differences between the two are alleged and satisfactorily established, it will be useful, in the first place, to consider whether under the law of England oil *in situ* is a *res nullius*. It should perhaps be mentioned at this point that the *lex fori* in this case is the law of Singapore but as neither party has relied upon any distinction between the law of Singapore and the law of England in these proceedings, I propose to proceed upon the assumption that there are no material differences between the two systems affecting the present appeal.

" In accordance with the maxim, *cujus est solum, ejus est usque ad coelum et ad inferos*, the owner of land in England has, from the earliest times, been the owner, not only of the surface but of every thing beneath the surface down to the centre of the earth, apart from percolating water which is not a subject of absolute ownership, and certain special exceptions such as treasure trove and gold and silver. The ownership of petroleum *in situ* was never the subject of any exception either at common law or under statute until 1934 when an Act of Parliament was passed which provided in section 1 that ' property in petroleum existing in its natural condition in strata in Great Britain is hereby vested in His Majesty and His Majesty shall have the exclusive right of searching and boring for and getting such petroleum '. It seems clear, therefore, that prior to 1934, petroleum *in situ* belonged to the surface owner under the ordinary common law principle and thereafter it became the property of the Crown by statute. The respondents sought to derive some support for the view that petroleum *in situ* is a *res nullius* from two decisions of the Privy Council, *U Po Naing* v. *Burma Oil*,[1] and *Borys* v. *Canadian Pacific Railway*.[2] *The Burma Oil case* contains dicta which suggest that the appellant in that case did not own the natural gas obtained from wells sunk for the purpose of extracting petroleum because natural gas *in situ*, like underground percolating water, was not a subject of ownership. Apparently the case of *Ambard* v. *Trinidad Asphalt*[3] was not cited but it should be observed that in that case Lord Macnaghten points out very clearly the fallacy of comparing minerals, even minerals of a fugacious character, with ' water dropping from the clouds on the face of the earth and percolating the ground in no definite channel '. It seems doubtful whether, in the light of present-day petroleum technology as indicated, for example, in the *Borys* case, the view that natural gas *in situ* is analogous to underground percolating water would still be followed: moreover since the decision in the *Burma Oil* case, Parliament has recognised natural gas *in situ* as a subject of property by including it in the statutory definition of petroleum in the 1934 Act. In any case, the *Burma Oil* decision merely relates to the ownership of natural gas *in situ* and does not touch the question of ownership of petroleum *in situ*. The second case relied upon by the respondents, in my opinion, provides even less support for the view that petroleum *in situ* is a *res nullius*. It is true that in the course of stating the opinion of the Board,

[1] [1929] A.C. 140.]
[2] [1953] A.C. 217.]
[3] (1899) A.C. 594.]

Lord Porter refers to the diverse views held in different countries regarding ownership of fugacious elements such as gases, oils, and water, but, in dealing with the particular matters for decision in that case, he states in terms that their Lordships agree with the conclusion of the Supreme Court of Alberta that ' the petroleum reserved was the property of the respondents, and all gas not included in the reservation was the property of the appellant,' which is clearly irreconcilable with the view that petroleum *in situ* or for that matter, natural gas *in situ* is a *res nullius*. So far, therefore, as English law is concerned, there is, in my view, no doubt whatever that petroleum in its natural condition in strata is not a *res nullius*; it has, throughout our legal history, been the subject of property; first, the property of the surface owner under common law, and latterly, the property of the Crown under statute law.

" Turning now to the Netherlands Indies law on this subject, it is interesting, but perhaps not altogether surprising, to find that it has had a similar history to our English law. Originally the owner of land in the Netherlands Indies owned all minerals beneath the surface but later this position was altered by a statute known as the Netherlands Indies Mining Law (enacted in 1891, and amended in 1910, 1919, 1938, 1940 and 1941) which provided that the surface owner should no longer have the right to dispose of minerals, (including petroleum) and that in future the Government, or persons authorised by the Government, should alone be entitled to develop them. The statute does not contain a ' vesting clause ', similar to the United Kingdom Act, vesting ownership of the minerals in the Government; but the appellants' experts on Netherlands Indies law, Dr. Nysingh and Dr. Funke, say this is to be implied from the fact that the Government is given power by the Mining Law, either to undertake development itself or to enter into agreements with third parties for such development. There appears to be nothing strained or difficult about such a construction but Dr. Veegens, the respondents' expert on Netherlands Indies law, took a different view, saying that the absence of a vesting clause meant that the minerals became a *res nullius* notwithstanding that hitherto they had always been the subject of ownership. Dr. Veegens supported his view with somewhat abstruse arguments from other sections dealing with the extraction of minerals, such as silver and zinc, when they are inextricably mixed *in situ* but it is significant that he could not give any other instance where under the law of the Netherlands Indies an immoveable was regarded as a *res nullius*. It would appear, that Dr. Veegens was not very closely acquainted with the Mining Law of the Netherlands Indies, as he had always practised in Holland and he had not heard of, much less studied, a text book on Netherlands Indies Mining Law which was said to be a standard work on that subject. The appellants' expert, Dr. Funke, on the other hand, had practised many years in the Netherlands Indies and seems to have been familiar with the mining law of that country. I prefer, therefore, the evidence of the appellants' experts on this question of whether a mineral *in situ* became a *res nullius* for the first time upon the passing of the Netherlands Indies Mining Law. But even on the most favourable view of the respondents' evidence, it seems to me impossible to say that they have satisfactorily proved the differences which they allege exist between English and Netherlands Indies law on this point and therefore, I fall back on the presumption that the foreign law is the same as the English law, which means that I find that minerals (including petroleum) *in situ* in the Netherlands Indies are not a *res nullius*.

"If minerals did not become a *res nullius* when the surface owners were divested of their title by the Mining Law, it follows in my view, that they became the property of the Government by virtue of section 520 of the Civil Code (which provides that immoveables which are unattended belong to the State) and of section 5A of the Mining Law which gives the Government the right to develop minerals; indeed it was not suggested they could become the property of any one except the Government if they were not a *res nullius*. The Mining Law, in addition to giving power to the Government to develop minerals itself, also authorises the Government to grant concessions for their development to third parties. In the present instance, the Government granted concessions to the appellants by a number of different instruments, all of which provide that the appellants shall have the exclusive right to explore and exploit the petroleum in the concession area for a specified number of years. The respondents contended that the interest thus created in the appellants was analogous to the incorporeal hereditament of English law known as a profit à prendre and consequently the petroleum did not become the property of the appellants until it was actually reduced into possession by extraction. The appellants, on the other hand, contended that the interest created by the concession was more analogous to a lease of minerals for a term of years, giving them a right of property in the petroleum even while under the ground. It may be doubted whether analogies of this kind, based on legal concepts derived from feudal and even Anglo-Saxon times, are helpful to a British Court when considering the interpretation of a concession granted under the statute laws of the Netherlands Indies, any more than analogies based on *emphyteusis* and *usufruct* would be helpful to a Netherlands Indies Court called upon to construe a grant made under the English Law of Property Act. Assuming, however, that some guidance can be obtained from English law on this matter, it is necessary to have clearly in mind the distinction between a lease and a profit à prendre. As is well-known, it is frequently a matter of difficulty for a Court to decide whether a particular instrument operates to create a lease or a profit à prendre. Each case must depend upon its own particular circumstances and the intention of the parties must be gathered from the instruments as a whole. If the Court is of the opinion that the intention of the parties is to confer a right of exclusive possession, unattended by a simultaneous right in any other person, the Court construes the instrument as a lease; but if, on the other hand, the instrument merely confers a right to use another's land for the purpose of taking a ' profit ' from it, the land itself remaining in the possession and control of the owner, then it will be regarded as a profit à prendre. Applying these principles, as nearly as may be, to the appellants' concessions, it appears to me that the grant by the Government to the appellants was more analogous to a lease than to a profit à prendre since it gave the concessionaire an exclusive power to explore and exploit the petroleum existing in the strata in the concession area for a term of years and contained nothing whatever to suggest that any other person could lawfully exercise any similar power in relation to the strata, least of all, could exercise a right of possession or control in relation to the strata, during the period of the concession, and indeed it was completely inconsistent with the exercise of any such power. The problem of comparing a concession with a lease or a profit à prendre was not, of course, put to the appellants' experts, Dr. Nysingh and Dr. Funke, or to the respondents' expert, Dr. Veegens, as the analogy, being concerned only with English law, would not have been understood by them, but they were asked the specific question whether a concession gave any property in the oil to a concessionaire before extraction. The appellants' experts were quite definite on the point and stated that when a concession was granted, the property in the unextracted oil vested in the concessionaire; the respondents' expert, however, adhered to his view that the oil was a *res nullius*, unless and until it was reduced into possession by extraction and therefore a concessionaire could not have any property in it before extraction. The conflict between the experts on this point is irreconcilable but on this matter also, I prefer the evidence of Dr. Nysingh and Dr. Funke to that of Dr. Veegens.

" The question of the precise nature of the legal interest created in the appellants by these concessions is, however, of less importance than it might otherwise be in view of the conclusion which I have reached as to when the appellants reduced the oil in the reservoirs into their possession. Possession in this sense is, of course, a question of fact, and, as Dr. Veegens remarked in his evidence, sometimes a difficult question of fact. But being a question of fact and not of law, it was not altogether appropriate that an expert in law should be asked to give his opinion on it. Nevertheless Dr. Veegens was questioned about this matter and gave it as his view that the oil was reduced into possession as soon as, but not before, it got into the ' vertical pipe '. In giving this opinion, Dr. Veegens was handicapped, as indeed the Board was also, by the circumstance that there was very little evidence at the hearing before the Board as to the position in regard to the operations of the appellants in the oilfields at the relevant dates. During the course of the hearing of the appeal, however, the evidence on this aspect of the case was supplemented by further facts which were agreed between the parties, and as a result, a somewhat clearer picture of the appellants' operations in the field is now available to the Court. As I have already said, the oil in question was trapped in a number of underground reservoirs from which it could not escape by natural means. The appellants had tapped these reservoirs by drilling a number of bore-holes or wells into them and by means of these wells, they were, at the outbreak of hostilities, extracting oil from them in substantial quantities in accordance with ordinary commercial practice. The question is whether in this state of facts the appellants can be said to have had possession of the oil in the reservoirs and this must in turn depend upon such further questions as the kind of physical control of which oil in a reservoir is practically capable, whether the appellants had physical control over the whole of the reservoirs, and whether they had sufficient control for practical purposes to prevent strangers interfering with the oil whilst it was still in the reservoirs. Unlike solid minerals, where control is acquired by sinking shafts and driving underground workings into the mineral deposits, control of oil in an underground reservoir is acquired by drilling wells—inserting ' vertical pipes ', as Dr. Veegens called them —into the reservoir from the surface. It was not suggested physical control could be exercised in any other way over the oil in an underground reservoir. The question whether the control is effective over the whole of the reservoir must depend, it seems to me, upon whether the number of wells is sufficient to enable the oil to be extracted from every part of the reservoir. In the present case, it appears to be reasonable to infer from the fact that the appellants were extracting oil from these reservoirs in substantial quantities in accordance with ordinary commercial practice, that they had drilled a sufficient number of wells to enable them to exercise effective control over all parts of the reservoirs. It is clear also from the evidence in this case that the appellants had sufficient control to exclude strangers from interfering with the reservoirs, subject to a few possible exceptions to which I will refer presently. In my opinion, therefore, the oil in the reservoirs was under the control of the appellants to the extent that it was capable of being under control and they were in fact dealing with it as fully and completely as any owner could deal with oil trapped in an underground reservoir. Accordingly I reach the conclusion that the appellants were in actual possession of the oil in the reservoirs at the time of the Japanese invasion. With regard to the possible exceptions, it was pointed out by counsel for the respondents that there were three or four reservoirs which, according to the map, appeared to be on or near the boundaries of the appellants' concessions and therefore, it was possible that they might extend beyond the appellants' concession areas under the adjoining land, in which event another concessionaire might, at some future date, drill wells into these reservoirs which are at present being exploited solely by the appellants. It this were to happen, some of the oil at present in the appellants' portion of the reservoirs might flow into portions of the reservoirs underneath the new concession areas, replacing oil which the new concessionaire had extracted through his wells, as occurred, or at least was envisaged, in the case of *Borys* v. *Canadian Pacific Railway*.[1] However, until this actually happens it seems to me that the correct view is that the appellants have possession of the oil in these reservoirs subject to the possibility that they may be divested of possession of some of it if a new concession is granted enabling the reservoirs to be tapped from the surface of the adjoining land. As this has not yet occurred, it does not affect my finding that at the outbreak of hostilities, the appellants had acquired possession of the oil in these reservoirs by drilling wells into them and extracting the contents on a commercial scale. In view of this finding, it matters not whether the interest created in the appellants by the concessions is to be regarded as analogous to a lease or to a profit à prendre; they had actual possession of the oil in the reservoirs and this, combined with the sole right to dispose of it, gave the appellants as complete a title to the oil as it was possible for any one to have during the period of the concession.

" I now turn to consider whether the appellants were at any time lawfully deprived of their title by the Japanese belligerent occupant in accordance with international law but before doing so, it will be convenient to mention briefly two subsidiary arguments on the *res nullius* aspect of the case, in view of the possibility that this case may be considered by another Court. The respondents contended that under Netherlands Indies law a trespasser who wrongfully reduces a *res nullius* into possession, as, for example, a poacher who wrongfully kills game on another's land, becomes the owner of the *res*. In this, Netherlands Indies law differs from English law which, as is clearly laid down in *Blades* v. *Higgs*,[2] provides that a *res nullius* reduced into possession by a trespasser becomes the property, not of the trespasser, but of the owner of the land. The respondents argued, therefore, that, on the assumption that the Japanese armed forces in extracting oil from the reservoirs were to be regarded as trespassers reducing a *res nullius* into possession, they would, under Netherlands Indies law, become the owners of the extracted oil. The short answer to this argument, in my view, is that an individual who commits a trespass when reducing a *res nullius* into possession is in a very different category from a belligerent occupant who does so. The former is subject to the restraints of the police and of municipal courts, whereas the latter is subject to no control at all and could,

[1] [1953] A.C. 217 at 220.]

[2] 11 H.L.C. 621.]

therefore, commit trespass continuously throughout the period of his occupation. The respondents maintained that this distinction was immaterial but in my view, it is very relevant in considering whether the municipal law of the Netherlands Indies relating to trespassers who reduce a *res nullius* into possession should be interpreted as being so benevolent as to include a belligerent occupant. I should require very cogent evidence to persuade me that 'trespasser' in this context includes a belligerent occupant and as this was not forthcoming, I reject this alternative argument of the respondents.

" The second subsidiary argument was an argument advanced by the appellants and was based on a Netherlands Indies Ordinance known as the Wartime Legal Relations Ordinance enacted in 1940. This Ordinance, which was said to resemble in some respects the English Trading with the Enemy legislation, provided that if any act was performed without the previous permission of a Committee acting under the Netherlands Indies' Director of Economic Affairs, which might directly or indirectly benefit the enemy, it would be void *ipso jure.* Therefore, according to this contention, the act of the belligerent occupant in reducing the *res nullius* into possession when he extracted the oil from the reservoirs (assuming it to be a *res nullius*, for the purpose of this argument) without first obtaining the permission of the Director of Economic Affairs' Committee, was void, *ipso jure,* and consequently no title was acquired by the belligerent occupant to the extracted oil. This argument illustrates the difficulty which arises if, as seemed to me to occur too frequently in the course of this case, international law is regarded as an entirely separate matter instead of being treated as an integral part of the law governing the issues in this appeal. The provisions of the Wartime Legal Relations Ordinance were, no doubt, very appropriate when applied to 'persons', as defined in section 1 of the Ordinance, but to contend that they apply to a belligerent occupant, that is to say, to an International Person, who is thereby placed under a statutory obligation to seek the permission of the Director of Economic Affairs before doing any act which might benefit the enemy (which is, of course, himself) is to my mind, an untenable proposition.

" I now proceed to consider whether the Japanese belligerent occupant had a right, under international law, to seize the crude oil in the ground and so deprive the appellants of their title to it. It was common ground that if such a right did exist in the belligerent occupant, it was derived from Article 53 of the Hague Regulations. Before, however, I examine this Article, it is necessary to consider a formidable submission advanced by the appellants which, if sound, renders a detailed examination of the Hague Regulations academic. The appellants contended that Japan commenced the war, or at least launched an invasion against the Netherlands Indies, in order to secure the oil supplies of that country, because oil is an indispensable raw material in conditions of modern warfare. Therefore the Japanese invading armies, as soon as they had established the necessary military superiority, seized the appellants' installations, ' lock, stock and barrel ', and then proceeded, as speedily as possible, to repair and put them into operation, using for that purpose civilian technicians, called ' Gunzokus ', who were attached to the army and placed under service discipline. The whole operation, according to the appellants' argument, was prepared and executed by the Japanese military forces in accordance with Japan's Master Plan to exploit the oil resources of the Netherlands Indies in furtherance of their war of aggression. The plan was successful and enabled the Japanese forces in South-East Asia in the course of the war to distribute vast quantities of oil, both crude and refined, to meet the needs of military and civilian consumers in the territories under their control and in Japan proper. This exploitation of the oil resources of the Netherlands Indies was, so the appellants contend, premeditated plunder of private property by the Japanese State on a totalitarian scale and as such, it was contrary to the laws and customs of war.

" The appellants rely upon the evidence of Japanese naval and military officers to prove the facts upon which this submission is based. The Chief of the Fuel Section of the Supply Depot of the Ministry of the Navy in Tokyo stated that he was concerned in the spring of 1942 with plans for restoring the oil fields of the Netherlands Indies and later he toured the captured oil fields and arranged for personnel and material to be sent to repair them and put them into working order again. From October 1943 onwards he was stationed in Singapore which was then being used as a storage and forwarding point for naval and military fuel; some of it was crude oil which was forwarded to Japan to be refined, some of it was aviation spirit and diesel oil and was used by the army and navy in Singapore. Further details concerning the processing, refining and distribution of the oil were given by the Japanese military officers who were stationed at Palembang and at the Headquarters of the Petroleum Office in Singapore which clearly show that in addition to supplying military requirements, the oil was also used to meet civilian demands. In my view this evidence establishes that the seizure of the appellants' oil installations in Sumatra by the invading army was carried out as part of a larger plan prepared by the Japanese State to secure the oil resources of the Netherlands Indies, not merely for the purpose of meeting the requirements of an army of occupation but for the purpose of supplying the naval, military and civilian needs of Japan, both at home and abroad, during the course of the war against the Allied Powers.

" These facts being proved, the next question to be determined is whether seizure of private property on such a scale and for such purposes was contrary to the laws and customs of war. On this point there is, fortunately, considerable authority available from decisions arising out of the war in Europe. First, there is the decision of the Nuremberg Tribunal, delivered in 1946, in which the principle is laid down that to exploit the resources of occupied territories in pursuance of a deliberate design to further the general war of the belligerent without consideration of the local economy, is plunder and therefore a violation of the laws and customs of war. This principle has been approved and further expounded in the cases of *In re Flick*,[1] and *In re Krupp*,[2] and *In re Krauch*,[3] where it was applied to the acts of German industrialists who systematically plundered the economy of occupied territories by acquiring substantial or controlling interests in private property contrary to the wishes of the owners. The present case is much stronger as the plunder of the appellants' property was committed not by Japanese industrialists but by the Japanese armed forces themselves, systematically and ruthlessly, throughout the whole period of the occupation. In my opinion, these authorities fully support the appellants' submission. Accordingly I reach the conclusion that the seizure and subsequent exploitation by the Japanese armed forces of the oil resources of the appellants in Sumatra was in violation of the laws and customs of war and consequently did not operate to transfer the appellants' title to the belligerent occupant.

" I now turn to the alternative argument urged by the appellants under this head, namely, that in any event the seizure was illegal as the crude oil in the ground was not ' munitions-de-guerre ' within the meaning of Article 53 of the Hague Regulations because it was then a raw material and moreover, an immoveable raw material. According to the British Manual of Military Law issued by the Army Council pursuant to the provisions of Article 1 of the Hague Regulations, ' munitions-de-guerre ' are such ' things as are susceptible of direct military use '. The respondents accept this interpretation of ' munitions-de-guerre ', as indeed they are bound to do since they are, in fact, the Crown although not appearing as the Crown *eo nomine* in these proceedings. Consequently they are compelled to argue that crude oil in the ground, although a raw material, is susceptible of direct military use or at least has a sufficiently close connection with direct military use to bring it within Article 53. No direct authority was cited for the proposition that raw materials could be ' munitions-de-guerre ' but the respondents referred to a passage in Oppenheim's International Law (7th Edition) at page 404 where it is said that ' all kinds of private moveable property which can serve as war material, such as . . . cloth for uniforms, leather for boots, . . . may be seized . . . for military purposes . . .' which they contend supports the view that raw materials can be ' munitions-de-guerre '. On the

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[[1] See *Annual Digest*, 1947, Case No. 122.]

[[2] *Ibid.*, 1948, Case No. 214.]

[[3] *Ibid.*, Case No. 218.]

other hand, Professor Castren, a Finnish Professor, in ' Law of War and Neutrality ', at page 236 says that ' Raw Materials and semi-manufactured products necessary for war can hardly be regarded as munitions of war '. It may be that certain types of war material or semi-manufactured products, such as cloth for uniforms and leather for boots, which could possibly be made up into finished articles by army personnel without the assistance of civilian technicians and outside plant can, without stretching the meaning of ' munitions-de-guerre ' unduly, be regarded as having a sufficiently close connection with direct military use to bring them within Article 53. It is not, however, necessary to decide this point as the facts of this case show that there is no such close connexion in the present instance. According to the evidence, elaborate installations and civilian technicians were needed by the army to enable them to appropriate this oil and prepare it for use in their war machines. It had to be extracted from underground reservoirs, then transported to a refinery, and then subjected to a complicated refining process before if was of any use to any one. In these circumstances, it cannot be said, in my opinion, that at the moment of its seizure in the ground, the oil had a sufficiently close connexion with direct military use to bring it within the meaning of ' munitions-de-guerre ' in Article 53.

" A further argument advanced by the appellants was that ' munitions-de-guerre ' does not include an immoveable and as the crude oil, when seized, was part of the realty, it was not a ' munitions-de-guerre '. The appellants conceded that certain things included in the categories specified in Article 53 which partake of the character of the realty, as for example, a railway transportation system, are seizable but they contended that these are exceptional cases and ordinarily Article 53 does not apply to immoveables. It was contended that oil in the ground could not be regarded as an exceptional case and in support of this view, reliance was placed on a dictum of Lord Simon in *Schiffahrt-Treuhand* v. *Procurator General*[1] to the effect that ' it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting) . . .'. Lord Simon was not, of course, intending to give an exhaustive interpretation of ' munitions-de-guerre ' but, it would, I think, be a startling extension of his phrase ' arms or ammunition which could be used against the enemy in fighting ' to say that it could include minerals *in situ*. In my judgment, Article 53 was intended to apply, generally speaking, to moveables and only in those categories where the description is wide enough to include things which may belong, in part, to the realty, as, for example, ' appliances for the transport of persons or things ' mentioned at the beginning of the second paragraph of the Article, is it permissible to interpret it so as to include immoveables. ' Munitions-de-guerre ' is not, in my view, such a category. Accordingly I

[[1] [1953] A.C. 232 at 262 (see *International Law Reports*, 1953, p. 667, at p. 673.]

hold that crude oil in the ground, being an immoveable and not susceptible of direct military use, is not a ' munitions-de-guerre ' within the meaning of Article 53.

" The appellants, who were nothing if not prolific in preferring alternative arguments, contended that even if crude oil in the ground could be seized as ' munitions-de-guerre ' under Article 53, the seizure in this case was invalid because no receipt was given to the owners or any one representing them. Article 53 does not in terms require a receipt whereas Article 52 (which deals with requisitioning) expressly provides for one; consequently it might be said, as a matter of pure construction, that the omission in Article 53 was deliberate on the part of those who framed the Regulations and such a requirement ought not to be implied. This, however, is not the view taken by the municipal courts which have construed this Article. In the case of *Bilotte*[1] decided in 1948 by the Netherlands District Court at Arnhem, it was held that the failure of German military personnel to give a receipt when seizing a car rendered the seizure invalid. The Court of Cassation at the Hague took a similar view in *Hinrichsen's* case in 1950.[2] In that case a German Customs Frontier Guard seized two motor cycles without giving a receipt to the owner and the Court held that ' this may not be done without in some way being officially acknowledged, in order to ensure compliance with the rule that such goods must be returned and compensation fixed when peace is made '. In reaching their decision the Court of Cassation referred to the report of the proceedings at the First Hague Peace Conference (1899) in which it was stated that although it had not seemed opportune to make a special stipulation with regard to a receipt, the Committee nevertheless were of the opinion that the fact of seizure should be clearly stated one way or another if only to furnish the owner with an opportunity to claim an indemnity. Furthermore, as the Court of Cassation pointed out, the British Manual of Military Law contains a statement to the same effect. The respondents sought to distinguish these authorities from the present case on the ground that a receipt or acknowedgment was not required when the seizure was otherwise notorious. No authority was cited in support of this view, but in any case it does not meet the case where, as here, the fact of seizure is notorious but the quantity seized is unknown. The appellants do not know and have no means of discovering how much crude oil was seized from their oil reservoirs during the Japanese occupation and even if everything else had been done according to law, it would not now be possible for them to claim the compensation expressly provided for in Article 53. It would have been quite a simple matter for the Japanese belligerent occupant to have given an official acknowledgment to the Custodian of Enemy Property who, so the Court was

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[[1] *Bilotte* v. *Groos and the State of the Netherlands*: *Annual Digest*, 1949, Case No. 182.]

[[2] *In re Hinrichsen*: *ibid.*, Case No. 179.]

told, was appointed by the Japanese in Sumatra to represent absent owners, and to have furnished him with proper records of the crude oil they extracted; but nothing of the kind was done and the failure to do so, was, in my opinion, an infringement of Article 53 and renders the seizure invalid.

"The last alternative argument advanced by the appellants on the construction of Article 53 was that even where the seizure is valid in all respects, the belligerent occupant obtains only a provisional title to the seized property and must restore it to the original private owner if it is still *in esse* at the cessation of hostilities. They contended that in the present instance the seized property was still *in esse* when hostilities ended and therefore the rights of the appellants revived and the property should have been restored to them. In support of this proposition, the appellants relied first, upon the express words of the Article which states that 'seized articles must be restored . . . when peace is made', secondly upon the views of Westlake (War, Vol. II, page 115) and Rolin (Le Droit Moderne de la guerre paragraph 492), and lastly on two cases decided in municipal courts in 1943 and 1947 (*Pigeat et Hazard* v. *Cie de Traction sur Les Voies Navigables, Dijon Court of Appeal*;[1] *Austrian Treasury* v. *Auer, Supreme Court, Austria*[2]). The respondents conceded that the provisions about restoration apply to some seizures and that if, for example, the seized article had been a motor lorry, the belligerent occupant would have been bound to restore it to the owner; but they contended that it would be contrary to common sense to apply these provisions to consumable war materials, such as petroleum, which are not readily identifiable as belonging to any particular owner. Such a distinction does not appear to be based on any principle but rather on the supposed difficulty of carrying out the provisions of the Article in practice. But if, in fact, there is no practical difficulty in identifying the owner of the property, as was the position in this case, I can see no justification for departing from the plain words of Article 53. The respondents further objected that if there was a duty to restore these petroleum stocks, it did not arise until peace was actually made. It is obvious, however, that the right of the belligerent occupant to use 'munitions-de-guerre' must cease with the cessation of hostilities, and it appears to me that when this occurs, the only right then remaining in the belligerent occupant is a right to retain possession of the property on behalf of the owner, all other rights in the property revesting in the original owner. Accordingly I am of the opinion that, on any view of the matter, the appellants were entitled to require the belligerent occupant to hold these surplus petroleum stocks on their behalf until such time as they could be restored in accordance with the provisions of Article 53.

[[1] See *Annual Digest*, 1943–1945, Case No. 165.]

[[2] *Ibid.*, 1947, Case No. 125.]

" I have now dealt with the many contentions put forward by the appellants in respect of the Hague Regulations. At the outset of his argument, counsel for the appellants claimed that in seizing this crude oil, the Japanese military forces had contravened the rules of international law in every single particular It was a sweeping claim but I am bound to say that I think he has made it good. The seizure of the oil resources of the Netherlands Indies was economic plunder, the crude oil in the ground was not a ' munitions-de-guerre ', the failure to give a receipt was a fatal omission and the duty to restore the unconsumed petroleum was not fulfilled. In all these matters, the belligerent occupant in my judgment, contravened the laws and customs of war and consequently failed either to acquire a valid title for himself or to deprive the appellants of the title which I have found existed in them prior to seizure.

" Before I leave the subject of the Hague Regulations I will refer briefly to the appellants' contention that in a war of aggression, such as this was, the aggressor state cannot in any circumstances acquire any legal title under the Regulations. This question was not very fully argued as counsel for the appellants asked that the appeal should be decided on narrower grounds although he naturally asked for the point to be kept open. Certainly this contention raises grave issues, reaching and extending far beyond the present case, touching indeed the springs of international law. The compelling logic of those who assert that all legal rights should be refused to an aggressor is opposed by the persuasive reasoning of those who maintain that such rules of war as are accepted by States should continue to prevail, notwithstanding the illegality of the war. Learned jurists differ profoundly on this matter and municipal courts have yet to give a decisive answer. In this state of uncertainty of the law, it is not, I think, desirable to express views on a matter which is not necessary for the decision in this case, and accordingly I do not pass upon it.

" Before dealing with the last major issue in this case, namely, the issue of *specificatio*, I would mention an argument which was strongly relied upon by the appellants at one stage of the proceedings but later receded somewhat in importance. In 1943, a number of the Allied Governments, including the United Kingdom and the Netherlands Governments, made a formal Declaration that they reserved the right to declare invalid any dealings with property in occupied territories, and in a covering statement, stated they were mutually pledged to examine and if necessary, implement the invalidation of such dealings when they extended across national frontiers. The appellants contended that this Declaration was, in effect, a treaty and although it did not affect the rights of individuals in the absence of legislation, it did, nevertheless, mitigate the Crown's belligerent rights by excluding from the category of enemy public property liable to seizure as war booty, any property which had been plundered from private owners by the Japanese armed forces in the first instance. The respondents challenged this argument at every step, contending that the Declaration did not amount to a treaty, and that in any case it did not detract from the rights of the armed forces of the Crown to seize war booty. They added that even if the Crown's seizure was invalid for the reasons urged by the appellants, this could not confer any title on the appellants, and therefore the contention based on the Inter-Allied Declaration was irrelevant to any issue which the Court had to determine in this case. The logic of this reasoning appears to me convincing and accordingly I reject the appellants' argument on this point.

"Finally I turn to the issue of *specificatio* upon which the respondents succeeded before the Board and which assumed great prominence in the arguments presented by the respondents to this Court. Stated in its simplest terms, the issue of *specificatio* is no more than this: if the Japanese armed forces did not deprive the appellants of their title when they seized the crude oil and shipped it to Singapore, does it make any difference that in some instances (of which the present is one), they refined it before shipment. The respondents strenuously maintained that it made a fundamental difference because, according to their contention, the action of the belligerent occupant in refining crude oil extinguished the appellants' title and vested the ownership of the refined product in the belligerent occupant; or, to put the matter another way, the belligerent occupant, by refining the crude oil, purged himself of his offences against the Hague Regulations and by virtue of this process created a new title in himself which was untainted by the original illegality and, therefore, valid against the appellants. They relied, in support of this proposition, not upon the laws of war but upon an ancient doctrine of municipal law, derived from Roman Law, and known in the Netherlands Indies as '*specificatio*'. This doctrine was embodied in the Netherlands Indies Civil Code in 1830 and is contained in Article 606 which reads as follows:—

> 'He who makes of a material not belonging to him a thing of a new sort becomes the owner of such thing provided he pays the price of the material . . .'.

The belligerent occupant, so the argument runs, made a thing of a new sort when he refined the crude oil, and therefore became the owner.

"Before examining the evidence on this matter given by the experts on Netherlands Indies law, it will be convenient to consider the English law applicable to this subject, since, if the Netherlands Indies law is not satisfactorily proved, it will be necessary, as in the case of the law relating to *res nullius* referred to earlier in this judgment, to fall back on the presumption that it is the same as English law. The relevant principle of English law is expressed with simplicity and clarity in *In re Oatway*[1] where Joyce J. states:—'It is a principle settled as far back as the time of the Year Books that, whatever alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material: *Blackstone*, Vol. II, page 405, and *Lupton* v. *White*.'[1] The same principle is approved in *Salmond* on Torts, 11th Edition at page 355:—' If my corn is wrongfully taken from me and made into flour, the flour is mine, and if my tree is cut down and sawn into timber, the timber is mine.' It seems clear therefore, that under English law, ownership in crude oil would not be extinguished by the process of refining, whether it is done by a private person or by a belligerent occupant.

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[1] [1903] 2 Ch. 356.

" It is against this background of English law that I now turn to consider the Netherlands Indies law on this matter. The experts on both sides were in substantial agreement that under Article 606 of the Civil Code, a private individual who refined crude oil belonging to someone else would become the owner of the refined product, but when they came to consider whether the same would hold good if a belligerent occupant refined crude oil which he had unlawfully seized in violation of the Hague Regulations, they were in strong disagreement. The respondents contended that a belligerent occupant could acquire title to private property under municipal law in the same way as any private individual and referred to the practice of military commanders in occupied territory obtaining supplies by purchase under the ordinary law. The respondents also cited the case of *The French State* v. *Lemarchand*[2] where, it was contended, the Court had, by implication, approved a belligerent occupant acquiring property under the local law by means of *accessio*, which, it was said, was similar in principle to a belligerent occupant acquiring title by *specificatio* under the local law. I very much doubt whether *Lemarchand's* case will bear the interpretation which the respondents seek to place upon it but in any event, it is not necessary in my view to consider exhaustively all the ways by which a belligerent occupant might acquire title to private property under municipal law independently of the Hague Regulations, as the only point for decision in this case is whether the method of *specificatio* was available to the Japanese armed forces after they had seized the crude oil belonging to the appellants contrary to the provisions of the Hague Regulations. The answer to this question turns upon the construction of Article 606 of the Civil Code read together with the Hague Regulations, in particular, Articles 46 and 53 of those Regulations, which form part of the statute law of the Netherlands Indies, having been enacted as a statute in 1910. Oddly enough the appellants' experts, Dr. Nysingh and Dr. Funke, were not specificially questioned on this point of construction, but the respondents' expert, Dr. Veegens, when asked about it, said that in his opinion the Japanese belligerent occupant could obtain a title by *specificatio* because a belligerent occupant has the same rights as any one else in the territory. Dr. Veegens fortified his opinion by reference to an official explanatory memorandum issued in 1947 to accompany the Rehabilitation of Rights Ordinance 1947 which states that where a Japanese body has administered a business during the occupation for itself, any products made by the business from raw materials belonging to another, would become the property of the Japanese body by *specificatio*. It should be observed that this memorandum does not refer to the Japanese belligerent occupant as such, but to ' Japanese or Japanized bodies ' which ran businesses in the Netherlands Indies as going concerns during the occupation, but, subject to this comment, the memorandum gives some support to Dr. Veegens' view that a belligerent occupant could acquire property by *specificatio* in the occupied territory. The appellants' experts however, profoundly disagreed with this view and went so far as to say that the memorandum could not have been drawn up by good jurists. Moreover they were not content merely to deny the correctness of the memorandum but, so to speak, counter-attacked by alleging that the doctrine of *specificatio* could not, in any circumstances, be applied to an enterprise, or, as Dr. Funke called it, a *universitas rerum*, like the appellants' installations in Sumatra. In other words they said that if a person makes a new thing from material belonging to another by means of the ' enterprise ' of that other person, the finished product does not, in such a case, become his property because *specificatio* does not apply to the operations of an enterprise. Dr. Veegens disagreed with this view just as emphatically as Dr. Nysingh and Dr. Funke disagreed with his interpretation of the memorandum on the Rehabilitation of Rights Ordinance. He stated quite categorically that the doctrine of a *universitas rerum* had nothing to do with the doctrine of *specificatio*. A further argument advanced by Dr. Nysingh and Dr. Funke was that *specificatio* was ' an act ' prohibited by the Wartime Legal Relations Ordinance and therefore void *ipso jure*, but Dr. Veegens would have none of this, saying that only an ' act-in-the-law ', that is to say, an act which is a manifestation of the will directly aimed at producing a legal effect, was prohibited by this section of the Ordinance. There was, unfortunately, practically no common ground between the experts on any of these topics, many of which involved legal concepts unfamiliar to an English lawyer. In these circumstances, it seems to me appropriate to recall the words of Lord Greene in *Rouyer Guillet & Co.* v. *Rouyer Guillet & Co.*[1] when speaking of the construction of foreign statutes:—' When you come to the statute law itself ', he said, ' although it is right that *prima facie* what must be considered is the evidence of the experts and not the text of the law, when the experts differ as to its meaning

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[1] (1808) 15 Ves. 432.]

[2] See *Annual Digest*, 1948, Case No. 198.]

[[1] [1949] 1 All E.R. 244.]

an English court is entitled and if it is to perform its function properly, is, indeed, bound, to apply its own mind, fortified by the opinion of the witnesses and giving what weight it thinks ought to be given to it, to the text itself and to examine it in order to make up its mind on the question of interpretation as between the two sets of witnesses '.

" Accordingly I now proceed to examine the text of Article 606 of the Civil Code and the relevant Articles of the Hague Regulations, in the light of the principle laid down by Lord Greene in that case. Article 606 begins with the pronoun ' he ' and therefore before a belligerent occupant can come within the scope of this Article, the word ' he ' must be construed so as to include not only a private person, but also an International Person, namely, a belligerent occupant. It is, to my mind, unlikely that the Netherlands Indies' legislature when they enacted this Article of the Civil Code in 1830, intended it to apply to a belligerent occupant who, normally, is quite independent of the laws and the courts of the occupied territory. Dr. Nysingh apparently shared this view because he stated, in his somewhat faltering English: ' Article 606 is not meant, does not apply, to cases like this when it came into existence during the occupation of this country '. But the other expert witnesses apparently did not address their minds specifically to this point. The further question to be considered is whether in any event the rest of Article 606 can be reconciled with the Hague Regulations, particularly Article 46, which states that private property must be respected, and Article 53 which prescribes the method by which private property may be lawfully seized. If it cannot be reconciled, then all the experts agree that the Hague Regulations must prevail. It is clear that Article 606 postulates that the person acquiring title to property by *specificatio* is a person having no lawful title to the raw material from which the new thing is made. Therefore a belligerent occupant seeking to acquire title under Article 606, must, *ex hypothesi*, have acquired the raw material unlawfully and this, in the case of a belligerent occupant, necessarily means inconsistently with the Hague Regulations. Consequently a belligerent occupant cannot bring himself within both the Hague Regulations and the provisions of Article 606. The two are irreconcilable and since the Hague Regulations prevail, it follows a belligerent occupant cannot avail himself of Article 606. But if this construction is not correct, the matter is, in my view, at best left in doubt and therefore a presumption arises in favour of English law, which, as I have already explained, preserves the title of the true owner if he can prove the identity of the original materials. Accordingly in my judgment the plea of *specificatio* fails.

" The further question whether a British court would apply the Netherlands Indies' law if it gave a title by *specificatio* to a belligerent occupant in circumstances such as occurred in this case, does not, therefore, arise, but if it were necessary to consider the point, I should be prepared to hold that it was contrary to public policy for a British court to recognize a foreign law which confers validity on illegal acts committed by a belligerent occupant in violation of the Hague Regulations.

" I would only add that it would indeed be strange, if after committing a breach of the Hague Regulations, the belligerent occupant could invoke the municipal law of the hostile state, not only to avoid the consequences of his delinquency but also to give him a good title against the world. The conclusion I have reached avoids this ironical result and harmonizes with the maxim '*Ex injuria jus non oritur*' which, as Professor Lauterpacht has said, expresses a principle of particular importance in the international sphere where sanctions cannot easily be applied against wrongdoers.

" For these reasons I am of the opinion that the appeal should be allowed. The appellants should have the costs of the appeal and of the proceedings before the Board."

Per Mathew C.J.:—" The claimants-appellants were the sole concessionaires of all oil concessions in Sumatra at the time that Sumatra was invaded by the Japanese military forces in the early part of 1942. The various installations were, as far as possible, put out of action before the Japanese arrived, but with the aid of certain oil experts working under the Japanese naval and military forces, the oil installations were repaired and oil production resumed. The whole output was used for Japanese requirements in the various theatres of war and in Japan. It is clear from the evidence of Admiral Watanabe that the seizure of the oil fields was planned before the Japanese invasion of the Netherlands East Indies, and that the purpose of the invasion was to secure oil supplies which Japan lacked. Such evidence as there is shows that the seizure of the oil fields was based not on any legal rights which might have been available to a belligerent occupant under the Hague Regulations, but on the basis that 'might is right', a concept unknown in any civilised legal system.

" The various refined products, the subject of the claim, which were seized by the British military forces on the reoccupation of Singapore in September 1945, were processed from the crude oil from the claimants' oil fields, which fact is not in dispute. I think it convenient here to say that in my view the seizure of the oil fields and installations, which were private property, was in clear violation of the Hague Regulations. The oil fields and installations were seized and operated by the armed forces of Japan, and there is no attempt or, indeed, any intention to deal with them as enemy property through a Custodian. The refined products with which we are concerned are the fruits of illegal extraction and processing. It required an illegal seizure of the claimants' private property before the crude oil *in situ* could be obtained.

" It is not contended by the Crown that the seizure of the crude oil can be justified by any article other than article LIII (2) of the Hague Regulations, which reads:—

> ' All appliances, whether on land, at sea, or in the air, adapted for the transmission of news or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.'

The effective words are: ' all kinds of ammunition of war '. Can crude oil be brought within the ambit of this definition, even if ' munitions-de-guerre ' is translated as ' war materials '? It is, I think, made clear in tthe Official Manual of Military Law, Chapter XIV sections 415 and 416, which were issued by His Majesty's Government in implementation of article 1 of the Regulations, that only materials can be seized which are susceptible of immediate and direct use. I am unfamiliar with the processes to which crude oil is subjected before it becomes a refined product, but it is apparent from the evidence of Captain Murphy that it requires a number of different processes to change crude oil into refined products. I find it impossible to compare crude oil, secreted in the bowels of the earth which requires high scientific knowledge and skill to extract and still more to process into usable products, with cloth and leather which require no more than a number of stitches to make coverings for the body or the feet and which though perhaps lacking in pleasing design are none the less utilitarian and are adequate for virtually immediate military use.

" The whole purpose of section III of the Hague Regulations articles XLII-LVI is to restrict the rights of a belligerent occupant in respect of private rights and private property. Article XLVI reads:

> ' Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.'

It is clear in its terms and, in my view, the seizure of the oil fields and installations was in flagrant violation of the Hague Regulations. The seizure of the crude oil on extraction was also in contravention of the Regulations and, so far as this aspect of the case is concerned, the Japanese must be regarded as having seized the oil without any claim of right and therefore failed to acquire a valid title in the oil seized which, as I shall deal with later, was always in the claimants. I cannot agree that in construing the Hague Regulations regard should be had to the fact that war has now become total, for this would have the effect of virtually removing all protection from private property and leaving private owners at the mercy of invading armies. As has been said in *re Krauch and Others*, (I.C. Farben Trial), United States Military Tribunal at Nuremberg, 29th July, 1948, reported in the Annual Digest of Public International Law Cases for the year 1948, p. 668, at p. 677:—

" 'It must be admitted that there exist many areas of grave uncertainty concerning the laws and customs of war, but these uncertainties have little application to the basic principles relating to the law of belligerent occupation set forth in the Hague Regulations. . . .

'We cannot read obliterating uncertainty into these provisions and phrases of international law having to do with the conduct of the military occupant toward inhabitants of occupied territory in time of war, regardless of how difficult may be the legal questions of interpretation and application to particular facts.'

In my view, the Japanese acted in contravention of the Hague Regulations, and committed an act of pillage against the claimants' properties, which rendered them liable to be condemned for a violation of the laws and customs of war. The various decisions of the Military Tribunals set up at Nuremberg after the war leave this point in no doubt.

" The case for the claimants shortly is that they were the only people entitled under the law of the Netherlands East Indies to extract the crude oil beneath these concessions, that the refined products which were seized in Singapore originated in these concessions, that the claimants were always the owners of the oil products, that the Japanese never acquired a title to those products under International Law or Municipal Law, and that even if they could acquire a title under Municipal Law, the operation of Municipal Law would be inconsistent with the established principles of International Law and could not be given effect to by the Courts.

" The Crown has denied that the claimants had any title to the refined products and have positively set up the defence, that the title to the products seized was in the Japanese. One of the submissions is that unextracted minerals under the Netherlands East Indies law are *res nullius*, and only become the subject of property when the *res nullius* is reduced into possession. Minerals being a *res nullius* the crude oil became the property of the Japanese when they extracted it.

" Of the three expert witnesses on Dutch Law, Dr. Veegens is the only protagonist of the school that regards unextracted minerals as *res nullius*. Under section 517 of the Netherlands Indies Civil Code of 1847 (which reads as follows):—

'1. The property in land implies the property in everything being on and in the soil.

2. The owner is free to plant and build on his land whatever he likes with the exceptions made in the fourth and sixth titles of this Chapter—(Rights and duties between neighbours etc. not relevant).

3. He is free to build and dig below the surface and to get all benefit thereof with the exceptions resulting from the laws and ordinances on the subject of mining, digging for peat and other similar matters.'

The surface-owner had ownership of minerals subject to the mining laws. In 1899 the Mining Law laid down (section 1) that:

> ' In the Netherlands Indies the owners of rights over the ground may not dispose of the following minerals '

of which oil is one specified. This, in Dr. Veegens' view, had the effect of taking away the property in the minerals from the surface-owner. The giving of a right to dispose of those minerals to a concessionaire, did not give the rights of an owner to a concessionaire. He insisted that the Mining Law was a comprehensive code dealing with the prospecting for and the development of minerals, and had nothing to do with ownership. That the Dutch legislators were at pains to avoid the question of ownership is clear from the explanatory memorandum (Ex: 58):—

> ' *Ad primum.* In the first place the draft bill fulfils the requirements of a good mining law to set out clearly and unambiguously its fundamental principles. The most important of these is that in the Netherlands Indies the owner of rights over the ground is not entitled to dispose of the minerals referred to in the law. What legal character should be attributed to these minerals, whether before discovery they must be considered as *res nullius*, as a right of the Crown or as part of the soil, is wholly irrelevant for the purposes of the maker of a practical mining law.'

In the Memorandum of Reply it is said:—

> ' And what advantage would the discoverer, the concessionaire, derive from a determination of their legal character, if he is guaranteed the right of free disposal oi the minerals in question? '

When Dr. Veegens was asked for his opinion of what the mover of the Bill said:—

> ' There are those who assert that the minerals are "*res nullius*"—a view with which the Government greatly sympathises, with the proviso that they are not "*res nullius*" in the sense ordinarily attached to that expression, for whereas in normal usage it is assumed that occupation gives rights to the "*res nullius*", here it is the concession.',

he replied rather lamely that it was a slip and did not agree with the other memoranda. I would feel rather that the mover was making a necessary point, namely, that as the right to dispose of minerals had been removed from the surface-owner, there would be those who would say that unextracted minerals from thenceforward would be *res nullius*. It was really an academic point and could have no relevance, for what does it matter, as ' the discoverer, the concessionaire . . . is guaranteed the right of free disposal of the minerals in question '? Does not this point to an intention to vest at least the effective rights of ownership in the concessionaire on extraction? But Dr. Veegens will not admit that any title in the concessionaire to extracted minerals flows from the Mining Law. The title to the extracted minerals flows, according to him, from article 585 of the Netherlands Indies Code which reads:—

> 'Moveable things not belonging to anybody, the title is acquired by the first occupant.'

Oil, though an immoveable, becomes a moveable on extraction. Article 520 (which reads):—

> 'Land and other immovables which are unattended and have no owner, and the things of persons who die without heirs or whose estates have been abandoned, belong to the State'

does not vest ownership in the State, because the Mining Law was enacted subsequently to the Civil Code. The right to dispose is only one of the attributes of ownership. I regret that Dr. Veegens was not asked about the *jus utendi fruendi abutendi* of Roman Law or article 544 of the French Civil Code (on which the Dutch Civil Code is based).

> 'La propriété est le droit de jouir et disposer des choses de la manière la plus absolue pour vu qu'on n'en fasse un usage prohibé par les lois ou par les reglèments.'

with a view to his explaining how the removal from the surface-owner of one attribute of ownership in minerals beneath his land rendered the minerals in question a *res nullius*. Were a law enacted prohibiting owners from disposing of old master paintings, the owner's right of disposing of his Rembrandt would have been taken away, but he would still have the right to enjoy it. It may be that the other rights of the surface-owner in minerals beneath the surface would be in the nature of a mere *nudum jus*, but he would still have dominium of a limited kind.

" It is impossible to accept Dr. Veegens' theory of unextracted minerals being *res nullius*, because the essential characteristics of a *res nullius* is that anybody can lawfully acquire it by occupation. In a concession field only the concessionaire can extract and dispose of minerals.

" The purpose of the Mining Law with its subsidiary legislation, the Mining Ordinance, was to ensure the orderly development of the mineral resources of the Netherlands East Indies. It effected this by removing from the surface-owner the right to dispose of minerals and by giving to the Government an absolute right to restrict prospecting to licensed prospectors and to restrict the extraction and disposal of minerals to selected concessionaires, or the Government itself to undertake prospecting and development.

" Dr. Funke's views are the more logical. Minerals are immoveable property and, therefore, under article 520, are the property of the State. When a concession is granted or a 5A agreement is made, the minerals become the property of the concessionaire (under section 16) on a grant or under section 5A on the conclusion of an agreement. Sub-section 1 of section 5A (1910 amendment) gives the right to the Government to prospect and develop areas not already conceded to others. Since 1919 oil can only be developed under a 5A agreement.

As regards extracted oil, Dr. Funke says that it cannot be the surface-owner's, as his right to dispose had been removed by section 1 of the Mining Law; the Government cannot be the owner because under section 5A Government may not come into conflict with concessionaires. *A fortiori* an unauthorised party cannot dispose. Oil extracted from a concession must belong to the concessionaire. On a proper construction of the Mining Law I do not see how any other opinion can be given.

" In my view, the *res nullius* theory does not stand up to critical examination, and I would agree with the minority view of the Board that unextracted minerals are not *res nullius*. In my view, further, the claimants had the exclusive right to extract and exploit, and that property in the unextracted oil was in them. Even if I am wrong, the claimants had property in the oil on extraction. How could it be otherwise under a law which guaranteed the concessionaire the right of free disposal of the minerals? The concessionaire was given an attribute of ownership which so far as the Mining Law was concerned was effective ownership.

" The next question which requires consideration is that posed by Mr. Cross, in his summary of argument:

> ' whether if the claimants had a title to the extracted crude oil that title survived the transformation of the crude oil into petrol by the Japanese.'

I do not think it is in dispute that the refined products, the subject of this claim, are new things made from crude oil. The question to be answered is—does section 606 of the Civil Code of the Netherlands apply in this case? We are not helped on the construction of this section by decisions of the Dutch Courts, there having been but one since the Civil Code was enacted in 1847, and that in 1875. We have only for assistance the evidence of the Dutch legal experts. The Board treated with scant justice Dr. Funke's views on this subject. He stated that oil wells, oil installations and oil plants fell under the principle of *universitas rerum*. He explained that where there is an enterprise, a business, a factory, they are regarded under Dutch Law as an entity and all the things in it are part of that enterprise. He illustrated the point by giving an example. If bandits take over a factory and run it and are thereafter thrown out, they cannot claim title to the goods they have made during their illegal tenure of the factory, for the goods produced are part of the concern. So he points out that the making of crude oil into refined products does not change the title, for the refined products are part of the enterprise. By way of explanation, he produced part of the new Civil Code being prepared by Professor Meijers together with an explanatory memorandum on the proposed new article. The Board appeared to think that he was giving an opinion based on a law that had never been enacted.

His intention was to illustrate that this was no new principle in Dutch Law. Professor Meijers, in his Commentary, says:—

> 'The universality remains the same even though a change takes place in its constituent parts. Herein lies embodied the rule of "Zaaksvervanging" (substitution of things) subrogation réelle—a rule which has been handed down to us from ancient times primarily for the universality of goods and to which *inter alia* sections 214, 542, 1032 etc. bear witness.'

The Board did not appreciate that Professor Meijers was merely incorporating in a new draft a principle which had been accepted for many years. The sections of the Code which he referred to clearly indicated the existence of the principle he was enunciating. He points out with force that if section 606 which reads:—

> 'He who makes of a material not belonging to him a thing of a new sort becomes the owner of such thing, provided he pays the price of the material and, if there are grounds for so doing, makes good the costs, damages and interests.'

is to be applied to every making of a new thing, then the employee of a firm becomes the owner when he manufactures a new thing out of raw products, the property of his employer. In my view, Dr. Funke's interpretation of the Mining Law carries out the intention of the legislature and gives the concessionaire, to the exclusion of all others, the right to extract and the right to dispose of minerals found within their concession areas, whereas Dr. Veegens, with elaborate argument has advanced a theory which defeats the whole intention of the Mining Law and gives rights of property in minerals to those who were never intended to come within the scope of the Mining Law. If he is right, his process of ratiocination has forced him to discard the maxim '*ex injuria jus non oritur*'. Dr. Veegens will not agree that article 520 of the Civil Code gives property to the State in unextracted minerals, yet calls in aid section 606 of the Civil Code for the purpose of giving a title to a belligerent occupant, who acted with a total disregard for the Hague Regulations, which are part of the Netherlands Municipal Law.

"In the summary of his argument Mr. Cross submitted, in my view correctly, that there were four questions—

> '(*a*) Whether the claimants owned the crude oil from which the petroleum products were refined before it was extracted from the earth;
>
> (*b*) whether (if not) the claimants obtained a title to it on its extraction by the Japanese;
>
> (*c*) whether, if the claimants had a title to the extracted crude oil, that title survived the transformation of the crude oil into petrol by the Japanese; and
>
> (*d*) whether (in any event) the Japanese were entitled under the Hague Regulations to seize the crude oil.'

which were not separate issues in the case, but a series of hurdles, each of which had to be successfully surmounted by the claimants before they could establish their case.

" In my view, the appellants have succeeded on all points. The *res nullius* theory of Dr. Veegens cannot be supported unless, as I have already said, a construction is to be placed on the Mining Law, which defeats the true purpose of the law. But for the invasion of the Netherlands East Indies by the Japanese it would have remained a nice point to be discussed by Dutch lawyers in their leisure moments. It is now a point for decision. We have been invited to draw analogies between fish, game, wild animals, water percolating through undefined channels and gas, and crude oil in situ. In my view, the analogies are not sound. In this case the crude oil was in natural reservoirs, incapable of passing outside the boundaries of the reservoirs. Its extraction was made possible by the sinking of wells. Under the Mining Law the claimants, to the exclusion of all others, had been given the right to extract and dispose of the oil. When the Japanese forces arrived in the Netherlands East Indies, the claimants had long since sunk oil wells and installed the necessary machinery to extract crude oil and refine it when drawn to the surface. They were in a position to extract and market all the oil in their respective areas for a period of years, and the quantity to be extracted was governed by purely economic considerations. It is immaterial to my mind that the extraction of all oil under the surface may not be complete when the concession comes to an end and the oil fields revert to the Government for disposal. I find it impossible to compare crude oil in natural reservoirs, the subject of an exclusive concession, with a fish in the sea or a deer in the forest or a fowl in the air, which becomes the property of the first person who captures it. These are true *res nullius*. But the oil in the claimants' reservoirs with the wells they have sunk would seem to me to be more analogous with a natural tank of water in a mountain into which the person who is granted it inserts a pipe and tap which he turns on or off at will. To protect his rights he locks the tap when he is away. The destroying of the installations before the arrival of the Japanese is analogous to locking up the water tank.

" Even accepting that unextracted minerals are *res nullius*, the claimants had, in my view, reduced the crude oil into possession before the arrival of the Japanese military forces. They had sunk wells into the oil reservoirs and had installed machinery which was bringing the crude oil to the surface. I find it difficult to conceive a more complete reduction into effective possession.

" The right of disposal is taken away from the surface-owner by the Mining Law, but a residuum of ownership rights would seem to remain and, indeed, a provision is made under section 99 (1) of the Mining Law for the owner of the surface rights to obtain full ownership of oil which he unwittingly taps when legally constructing works on his land which has not been conceded. If there were a concession, he would have to hand over to the concessionaire. The whole object of the Mining Law is to ensure that minerals when extracted go to the concessionaire and to no one else. The silver concessionaire who extracts zinc hands it over to the zinc concessionaire, if he wants it, on payment of extraction costs. Whether minerals underground are a *res nullius*, which I am unable to hold, the minerals on extraction are the property of the concessionaire and of no one else. In my view, the concessionaires had an absolute right during the currency of their concessions to the crude oil which came from their concession areas, this right continued through the processing period and the refined products could only be the property of the claimants. The obsolete doctrine of *specificatio*, when used to protect an honest labourer, is reasonable; but to apply it to protect the activities of thieves who continued their depredations without interruption for more than three years cannot be supported in reason or on a proper construction of the Netherlands Indies Law. The claimants had certain rights of property in the oil, which could not be destroyed. They had rights in rem in respect of the oil in their concession areas, and had the right to mortgage (under section 18 of the Mining Law) their concession rights. The concessions (I use the expression to cover all rights of exploitation conferred under the Mining Law) gave them rights in rem.

" As I have already said, Dr. Funke's expert evidence on the Mining and Municipal Laws should have been accepted by the Board and, indeed, he was not only a distinguished lawyer but had also practised in the Netherlands East Indies for many years, and was thereby particularly fitted to give evidence on the Netherlands Indies Law, whereas Dr. Veegens had not, nor had he learned of the leading text book on the Mining Law.

" In my view, this case is far less involved than the length of the record, the number of exhibits considered, the law discussed and the issues canvassed would lead one to suppose. On a first view, refined oil products in the possession and under the control of the Japanese military forces were *prima facie* property which properly could be seized by the British military forces without payment; but when it appeared that these refined products came from the claimants' oil fields, the problem of ownership and a right to compensation were, in my view, resolved. If the complicated theories of Dr. Veegens are put on one side, there remains the clear and reasoned opinion of Dr. Funke (supported by Dr. Nysingh) on the Mining Law and the Civil Code, which makes it clear that property in unextracted minerals is in the concessionaire from the day the concession is granted and that the Dutch Courts could not hold that property in the oil would be lost by the application of an obsolete provision of the law, which would have the effect of giving rights in stolen property to thieves. *Specificatio* is a doctrine unknown to English Law, and property which has been changed remains the property of the owner and can be taken back when traced. In my judgment the doctrine of *specificatio* could not operate so as to give the Japanese a title in the refined products.

" I do not propose to discuss the effect of the Rehabilitation of Rights Ordinance, the Declaration of London, the Wartime Relations Ordinance and the *Rose Mary*[1] case or to decide whether under the Singapore law oil is a *res nullius*, for these questions do not, if my view of the Netherlands Indies Law is correct, require to be considered. I think it clear that the Japanese acquired no rights of property in the crude oil or in the refined product, under the Hague Regulations, and that under the Netherlands Indies Municipal Law the claimants acquired rights of property in the unextracted and extracted oil which rights they never lost.

" I would allow this appeal and enter judgment for the claimants-appellants for the amount claimed with costs here and below.

" I would add that since writing my judgment I have had the advantage of reading the judgment of the learned President, who has considered fully the large number of subsidiary and alternative arguments advanced both by the appellants and the respondent. I am fully in agreement with his conclusions and the reasons therefor."

Per Whitton J.:—" Before examining the legal problems which confront us I would observe that, except on one point, it seems to me the facts are sufficiently established to make it unnecessary to give them consideration in this judgment separately from the legal issues on which they have a bearing. The point to which I refer is the position with regard to crude oil in the reservoirs before it is extracted, a matter on which there is not much information before the Court. It was agreed by counsel before the close of the hearing of the Appeal that the crude oil in Sumatra is contained in reservoirs from which it does not escape except through wells drilled into the reservoirs, but it also appeared to be the case that, while all existing rights in regard to productive tanks were exclusively owned by the claimant companies, all the reservoirs were not necessarily wholly situated in the concession area. It cannot, therefore, be said in the light of these facts and in the absence of sufficient evidence as to the fugacity or otherwise of crude oil of this sort that all crude oil extracted in the oilfields covered by the concession must at all times before extraction have been in the concession area reservoirs.

" I now approach the first main issue—whether the Appellants had a title to the crude oil either ' in situ ' or on extraction. The Board did not reach an unanimous view on this issue, but considered a definite finding was not essential having regard to other conclusions it reached. Of the three witnesses expert in Dutch law who testified before the Board, Doctors Nysingh and Funke expressed the opinion that the Claimants as concessionaires were owners of all oil extracted from the oilfields covered by the concession, this being so even if extraction was by a third party, while Dr. Veegens considered the Claimants acquired no title to oil removed in the circumstances of this case. Before, then, this Court can hold Dutch law on this question has been satisfactorily proved it must feel there are conclusive grounds for accepting one or the other of these opposing opinions.

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[1] [See *International Law Reports*, 1953, p. 316.]

"To take first the evidence of Dr. Nysingh, he expressed the opinion that a Netherlands Indies Court would hold that the Claimants at all material times were the owners of the stocks which form the subject of this case, and that the Japanese had no title at all to the stocks. He went on to say his opinion was based on the general law in the Netherlands Indies and on special legislation enacted there during and after the war. Confining myself for the moment to the general law it is plain that Dr. Nysingh had mainly in mind the Netherlands Indies Mining Law, and he referred to sections 2, 5A, 7 and 13 in conjunction with Dr. Wally's affidavit as covering the grant of the right to acquire oil, and to section 16 as covering the concessionaire's rights after he had been granted the concession. In view of the wording of this section generally and of the phrase 'exclusive right to extract' in particular Dr. Nysingh's statement that once the grant was made no one but the concessionaires had any right to dispose of the oil seems well supported. It is not at all clear, however, that the grant equally creates ownership in the oil before reduction into possession, and indeed Dr. Nysingh conceded that the question of property in minerals before extraction was an open one. Dr. Funke, who at one time practised in the Netherlands East Indies, associated himself with Dr. Nysingh's views as to the ownership of the extracted oil. He also did not claim the concessionaires had ownership before extraction. Dr. Veegens held the oil was a '*res nullius*' until extraction. In the light of these opinions I think it can be said at this stage that this Court, whatever construction it might be disposed itself to place upon the relevant statutes, would not be justified in holding ownership of the crude oil 'in situ' had been proved according to Dutch law. But before forming a conclusion as to the position on extraction it is necessary to consider the views of Dr. Veegens more fully. He thought the property in the oil was in the Japanese when they got the oil into the pipe lines which they were operating. The steps in his argument may be summarised as follows:—

(1) One has to look at the Mining Law to see to what extent property which would otherwise be in the owner of the ground has been dealt with by legislation, and the Mining Law took from the owner his right to the minerals.

(2) As the Mining Law clearly avoided determining ownership in them the minerals became '*res nullius*'.

(3) By virtue of Article 506 (3) of the Netherlands Indies Civil Code the minerals are immovables before extraction but on extraction become movables.

(4) By Article 598 of the Code ' movable things not belonging to anybody the title is acquired by the first occupant.'

(5) The grant of a concession does not give such a title, and reduction into possession is essential to obtain title.

" Before attempting to assess the values of these contradictory expert opinions I would observe it seems certain that, since there is no suggestion the Japanese set up new apparatus for extraction as distinct from restoring and rendering workable the Claimants' apparatus, whatever element of fugacity crude oil may possess underground, and whether extraction be regarded as taking place when the oil enters the pipes while still many hundred feet down in the earth or only when it reaches the surface, the crude oil with which we are dealing must have been at the moment of extraction in a part of a reservoir, or in parts of reservoirs, included in the concession area. This being so, I think it can at least be said that the views of Dr. Nysingh and Dr. Funke more closely accord with ordinary conceptions of ownership. It seems to me, however, that the conclusions of Dr. Veegens are, with respect to him, open to a more serious criticism. In the first place in relying on Article 585 of the Civil Code for the proposition that as movable things do not belong to anybody the title is acquired by the first occupant he fails, to my mind, to give due weight to the specific provisions of the Mining Law and the concessions. I do not doubt that cases of mussels and shells and deer in a deer-park may have a bearing in this connection but I venture to suggest the more logical approach must be first to see whether the law and instruments dealing with the subject in issue do not themselves give the answer to the problem. Examination of the document G.J.W. 2 attached to Dr. Wally's affidavit (we have been assured all the concessions may be regarded being in the same terms) shews the Claimants were granted the exclusive right to produce and exploit, within the mining field, the minerals referred to in the deed granting the concession, and Dr. Wally himself states that at the date of the seizure by the Japanese on the basis of the laws in force in Indonesia at the time ' no legal ownership of crude oil by means of exploitation of oilfields could be obtained by others than the afore-mentioned companies.' Dr. Wally was an officer in, and eventually became head of, the Mines Department in Indonesia. He is not, apparently, a lawyer, but it is perhaps noteworthy that this statement was not given as an expression of opinion but as a declaration of fact. This evidence brings me to what I regard as a decisive point in the argument for the Claimants. If the grant of the concession gave the concessionaires an exclusive right to dispose of ownership in the extracted oil, which it plainly did, it would seem to follow that it must have vested in them exclusive ownership in such oil. In this connection I find attractive the contention, though admittedly the weight which may be properly attached to it is open to doubt, of the Minister in charge of the introduction of the Mining Law that 'whereas in normal usage it is assumed that occupation gives right to the '*res nullius*', here it is the concession.' Be this contention correct or not it seems to me a tenable view that the combined effect of the Mining Law and of the concession instruments is that the Claimants had ownership conferred upon them, if they did not have it previously, by the physical act of extraction, whether by themselves or by a third party. If this view is correct it would seem to follow (assuming Dutch law on the matter to be the same as English—and we have had no evidence to the contrary) that these specific provisions of law must override the general provision of Article 585 of the Civil Code, in so far as it is inconsistent with them. As Article 585 makes 'occupation' the sole test whereby title is acquired I do not think it has application to a case like this where an exclusive right of disposal, and consequently, in my view, of ownership, is created by the mining laws and the concessions. I consider, therefore, that the argument of Dr. Veegens breaks down at this point. I would add that I do not think what may be for convenience called the silver and zinc contention affects this conclusion, as it only applies to a statutory modification of the rights otherwise conferred by a concession when more than one concessionaire and more than one mineral is involved.

" For these reasons I am prepared to accept the views of Drs. Nysingh and Funke and to hold it as proved under Dutch law the oil in question was at the date of extraction by the Japanese owned by the Claimants-Appellants.

" The Board, while unable to agree on the issue of ownership at the date of extraction, proceeded to the finding that in any event the Japanese acquired a title by reason of the doctrine of 'specificatio'. This old doctrine is seldom heard of in the every day practice of Dutch Courts, but it is also clear that it was still part of the law of the Netherlands East Indies. It is contained in section 606 of the Civil Code:

> 'He who makes of a material not belonging to him a thing of a new sort, becomes the owner of such thing, provided he pays the price of the material, and if there are grounds for so doing, makes good the costs, damages and interest.'

It is common ground that, despite the proviso, non-payment does not prevent ownership passing. Mr. Veegens expressed the view:

> 'It' (Section 606) 'does not distinguish whether the making of the material is on a small scale or a great scale, whether it is incidental or in the course of running an enterprise. It does not distinguish in which way the maker obtains possession of the material.'

He considered that the refining of the oil into gasoline and diesel oil in the present case was ' without the slightest doubt ' a case of ' specificatio ', and said that aviation gasoline became a thing of a new sort when it was refined. Applying the rules of ' specificatio ' to this case he maintained the property in all the products was so acquired by the Japanese if not otherwise.

" Dr. Veegens's conclusions on this point were attacked on at least four grounds: firstly, that the physical change in the crude oil was not of a kind to effect ' specificatio '; secondly, the doctrine had no application to the seizure of the property of an ' universitas rerum ' as occurred in this case; thirdly, even if ' specificatio ' had taken place its legal effects were nullified by subsequent legislation; and fourthly, in any event the doctrine had no relation to a case like this where International Law was applicable.

" The two experts called by the Appellants expressed views very diverse from those of Dr. Veegens on this matter, and in particular they maintained the doctrine of ' specificatio ' could not apply to an ' universitas rerum '. Dr. Funke based his argument on a quotation from a commentary by Professor Meijers on the Professor's own draft of a new Civil Code to the effect that the rule governing an ' universitas rerum ' entails that a person who has a right to the universality can enforce a similar right to the goods which have taken their place; and the witness illustrated his interpretation of the rule by giving as an example that if bandits took over a factory and ran it for a time but were then expelled they could never claim title to the products produced when they were in occupation.

" I am not convinced that Dr. Funke succeeded in establishing his point that Professor Meijers's proposed legislation on this subject was merely a question of codifying existing law, though I do not doubt it embodied a principle which was, to a greater or less degree. recognised by Dutch jurists. Again I think that neither Dr. Nysingh nor Dr. Funke replied very successfully to the contention that the Explanatory Memorandum to the Rehabilitation of Rights Ordinance shewed section 48 of the Ordinance had been enacted to avoid the effects of ' specificatio ' which would have otherwise resulted under the general law in certain cases where the Japanese had seized business enterprises. On the other hand I think the Appellants appeared to the greater advantage in the arguments based on the War Time Legal Relations Ordinance, 1940, and especially in their submission that an ' act-in-law ' is specifically so described in the Ordinance where it is meant, from which it was to be implied that what sections 6 and 7 hit at was the act and not the persons doing it, and that consequently the turning by the Japanese of the crude oil into various types of petrol was a prohibited act. Nevertheless, whichever views on this matter one is disposed to regard as the more persuasive, I think it is true to say in the face of such contradictory expert opinion, and that on a section of the law little encountered in practice and now relied upon relative to abnormal circumstances, Dutch law as far as this part of the case is concerned has not been proved. In that situation it is for the Court to apply English law. The applicable English principle is stated in *In re Oatway*.[1] I think it is clear that under English law ownership could not have been extinguished by the process of refining carried out in this case. I am of the opinion, therefore, that the Japanese cannot correctly be held to have acquired ownership by ' specificatio '. For reasons I shall presently indicate I also think that if the Japanese did not acquire ownership by ' specificatio ' there was no other way in which in the circumstances they could have acquired it.

" In approaching the subject of the applicability of the Hague Regulations I would make the general observation that I do not think there is any ground on which this Court need hesitate to associate itself with the ' dictum ' of the Tribunal in *Krupp's*[2] case (Ex. 5, p. 622), a ' dictum ' which merely confirmed what the International Military Tribunal had already held, that the doctrine that the provisions of Hague Convention No. IV and the Regulations attached to it do not apply in ' total war ' must be emphatically rejected. In this connection it is to be borne in mind that Japan, like Germany, was a signatory to the Hague Convention. Akin to this view is the conception that even a State waging illegal war is entitled to the benefit of the Hague Regulations, a conception which appears to have been acted upon by European Courts dealing with cases arising out of the second World War, and which has now received the authority of Dr. Lauterpacht's acceptance. Now turning to the Regulations themselves we find a general protection is given to private property by Article 46. An army of occupation may, nevertheless, seize, subject to certain conditions, by virtue of the second paragraph of Article 53, certain kinds of private property including ' all kinds of ammunition of war '. The legality or otherwise of the seizure of this crude oil mainly turns on the issue whether crude oil is a munition of war—a ' munition de guerre ' in the original text. I say ' mainly ' because even if the seizure was *prima facie* covered by the Regulations the question of compliance with the prescribed conditions must not be overlooked. Our task is not made the easier, unfortunately, by the opinions advanced in some quarters that the Regulations are to be interpreted more widely than formerly to meet modern conditions. In this connection the Tribunal in *Krupp's* case in 1948 expressed the view:

' The Articles of the Hague Regulations quoted above '—this included Article 53—' are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down by the Regulations.'

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[1] [1903] 2 Ch. 356.]

[2] See *Annual Digest*, 1948, Case No. 214.]

A similar view on the part of the International Military Tribunal is quoted by Dr. Lauterpacht in the 'Annual Digest and Reports of Public International Law Cases' (Ex. X 10, p. 672). Again it was said by the United States Military Tribunal at Nuremberg (X 11, p. 358):

> 'It has been earnestly contended by the defense that the rules of belligerent occupation have, in fact, been greatly relaxed and that the defendants could not properly be convicted on the basis of the law in force at the time of the alleged misdeeds. We have considered this defense and the arguments waged in support thereof. We find no adequate justification for the position thus taken.'

In the sphere of municipal decisions the Dutch case of *Esau*[1] and the Norwegian case of *Johansen*[2] do not suggest the Courts which heard them considered the Hague Regulations were to be interpreted differently from before. I conclude, accordingly, there are not grounds for holding Article 53 is to be interpreted less strictly than before.

"The Appellants relied strongly on the argument that plants and installations are not '*munitions de guerre*' because of their immovable nature, and that consequently crude oil whether in the original reservoir or after extraction cannot be '*munition de guerre*' before it is refined. Emphasis was laid on the fact that crude oil cannot be used for defence or offence until processed, and, moreover, other elements have to be mixed with it before it can become available for military use. In connection with this argument it was pointed out that it has never been suggested coal is a '*munition de guerre*'.

"In a case like this where it is arguable if the property falls within the scope of Article 53 it seems to me the most satisfactory test is to pose the question whether it is the sort of property the signatories to the Hague Convention intended should be protected for seizure.[3] In 1907 the horse and the steam-engine were still the main propelling forces used in land transport, and in wars up to that time the part played by mechanical transport was scarcely more than ancillary—getting the soldiers and their equipment to the field of battle. Yet seizure of appliances for transport, which was, of course, chiefly railways, was authorised, even if private property. By 1939 petrol-driven vehicles had themselves become the central element in a specialised form of military operation, as the German invasion campaigns in Poland and Western Europe demonstrated, and the aeroplane had become a major factor in warfare. These changes in the nature of warfare necessarily make it more difficult to determine

[1] See *Annual Digest*, 1949, Case No. 177.]

[2] *Johansen* v. *Gross*: (1948) Appeal Case No. 15/1946 of the Haalogaland Lower Court of Appeal; see *Annual Digest*, 1949, Case No. 176.]

[3] *Sic.*; *scil.* "from".]

whether crude oil is a '*munition de guerre*'. It seems to me, however, had the Japanese been fortunate enough in 1942 after capturing Singapore to find in the place this petrol ready for use, as the British Military Administration found it in 1945, it could not be correctly maintained it would have been a violation of Article 53 had they employed it for the purposes of their campaigns. If it is conceded a belligerent is entitled to seize petrol which is ready for immediate use it seems to me it cannot be logically maintained he is not entitled to seize the crude material out of which the finished products are created, since the protection accorded private property by the Regulations is obviously limited by the exclusion of what the signatories to the Convention presumably regarded as the legitimate necessaries of a belligerent occupier in the execution of his war effort, as the modern phrase has it, and once it is allowed that a certain kind of property is a necessary for the conduct of a war there scarcely seems reason to maintain that private interest can prevail in respect of the raw material out of which the property is made simply because in such circumstances extraction and processing have first to be carried out. It is true, in this connection, that an undoubted difficulty in the Crown's submission that the seizure was legal under Article 53 is the statement in the Manual of Military Law that private property falling within this category must be susceptible of direct military use. It cannot be said that the crude oil would under any circumstances have been readily susceptible of direct military use, even though the denial action taken by the Dutch authorities necessitated more complicated steps to render it fit for that purpose than would otherwise have been required. Nevertheless had this been the only obstacle to accepting the Crown's contention I should have been inclined to hold that, having regard to the exigencies of modern warfare and the nature of this particular product, this aspect of the matter was not necessarily fatal to the Crown's case. It must be recognised, however, that in several ways the seizure violated the Regulations. In the first place there is nothing in the circumstances to suggest the Japanese were seeking to observe the terms of the Hague Convention. Secondly, whether a receipt is essential or not, it seems clear some record of goods removed must be kept if the protection contemplated for private property under the Regulation is to have reality, and there is no evidence the Japanese attempted to do this. Again it is plain that a considerable portion of the crude oil removed was directed to purposes which could not in any sense be said to fall within the classification of military necessity. For these reasons I have formed the conclusion the seizure was in contravention of Article 53 and illegal.

"The relevant portion of Article 53, moreover, requires that property seized within its terms must be restored and compensation paid on the conclusion of peace. In this connection it was argued on behalf of the Appellants, convincingly to my mind, that a seizure under the Article never transfers title, and that in the case of an expendable product the occupier is under a duty to return to the owner at the end of hostilities unexpended portion. Having regard to this aspect of the matter I think that, even if the seizure had been lawful under the Regulations, the Japanese, and consequently the Crown were under an obligation to restore, or to pay compensation for, the oil which remained.

" In conclusion I proceed to consider the effects of the Inter-Allied Declaration. The attitude adopted by the Crown over this claim was criticised strongly on moral grounds as well as legal, and in particular it was suggested it was in flagrant disregard of the obligations undertaken by His Majesty's Government in the Inter-Allied Declaration of 1943 (Ex. 1). From the document itself we learn that it was a formal declaration by the British Government and the sixteen other Governments who were also parties to it ' of their determination to combat and to defeat the plundering by the Enemy Powers of the territories which have been overrun or brought under enemy control '. This language, it may be said at once, does not suggest that a lawful seizure under Article 53 of the Regulations would be within the scope of the enemy actions it was intended to defeat. If, however, the seizure in the present case was not legal under the Regulations it was a form of looting, and from the last line of the Note attached to the Declaration clearly an act covered by the Declaration. The Appellants relying on the contention that the seizure was unlawful submitted that by virtue of the Declaration the Crown had stated in advance they would not recognise illegal transfer of private property in occupied territory, and that, therefore, to maintain they were entitled to seize the oil as war booty was a violation of a solemn undertaking. The Crown in effect reply that as a matter of construction Ex. 1 was only a declaration of present intention to do something in the future, and not in itself binding. It was, they say, a general statement of attitude, and not something to which contractual effect can be given. Examination of the Declaration must, I think, support this view, and on the evidence before us there seems to be very little ground for any assumption that the parties ever subsequently took steps to give it practical effect. In particular it is noteworthy that they ' reserved their right ' to declare transfers invalid. The Note states, ' It is obviously impossible for a general declaration of this nature to define exactly the action which will require to be taken when victory has been won. . . .' I find it difficult to resist the conclusion that the Governments concerned clearly contemplated additional action before their undertaking was to become operative, and, much though it may be regretted that the Declaration seems to have remained an expression of laudable intentions, this circumstance does not alter the point that the onus of proving it had treaty effect has not, in my opinion, been discharged by the Appellants, But, as may be inferred from the views I have expressed on the legal aspects of the seizure, I do not think the Appellants have to rely on the Declaration to succeed.

"For these reasons I would allow this appeal, . . ."

[Reports: 1956 Singapore Law Reports, p. 65; *Malayan Law Journal*, 22 (1956), p. 155.]

NOTE.—This case is discussed by "B" in *International and Comparative Law Quarterly*, 5 (1956), p. 88. See also E. Lauterpacht, "The Hague Regulations and the Seizure of *Munitions de Guerre*", in *British Year Book of International Law*, 1955–1956, pp. 218–243.

Belligerent Occupation—Requisition of Premises by Occupying Power—Unlawfulness of Requisitions for Reasons Other Than Those Dictated by Necessities of War.

EBRAHIM *v.* BABU MADAN GOPAL BAGLA.

Burma, High Court of Rangoon. November 29, 1948.

(U Thein Maung C.J., U San Maung J.)

THE FACTS.—A subordinate Court directed the appellants to pay to the respondent a certain sum as compensation for the use and occupation of premises in Rangoon, requisitioned for the use of the appellants by the Japanese occupation authorities, from December 1943 to December 1944. The appellants argued on appeal that the trial Court should have held that the premises were lawfully requisitioned for the Japanese Army during the occupation of Burma.

Held: that the appeal must be dismissed. Under international law the invading power may only occupy temporarily private lands and buildings for all kinds of purposes demanded by the necessities of the war. In a claim for compensation for use and occupation of a building, mere proof that a Japanese officer requisitioned a portion of the building was no defence.

The Court said: "There is no evidence whatsoever as to the name, rank or authority of the Japanese officer who is alleged to have requisitioned the rooms. The learned advocate for the appellants relies on Exhibit E wherein the lawyer for the respondent has described the Japanese officer as 'one Navy officer of the Japs'. However, the description is not at all sufficient to justify the presumption that he was the commander of the respective area or that he had authority to requisition the rooms.

"The Hague Regulations, which provide for requisitions in kind and of services being made 'for the needs of the army of occupation' do not provide for requisitioning [of] immovable private enemy property (see Articles 46 and 52).

"Lawrence has stated at page 440 of the *Principles of International Law*:

'Dealing first with immovables, we may lay down that as a general rule they are held to be incapable of appropriation by an invader . . . the profits arising from them are free from confiscation and the owners are to be protected in all lawful use of them. But troops may be quartered in private houses, though the inhabitants may not be ejected from their homes to make more room for the soldiery.'

"However, after referring to Article 46 of the Hague Regulations, which expressly enacts that private property must be respected and may not be confiscated, Oppenheim has stated at page 319 of his *International Law*, Vol. II, 5th edition:

'But confiscation differs from the temporary use of private land and buildings for all kinds of purposes *demanded by the necessities of war*. [Emphasis supplied by the Court.]

Pitt Cobbett has also stated in the *Cases on International Law*, Vol. II, 5th edition:

'Land and buildings belonging to private owners may be temporarily used by an invader for purposes required by military necessity.'

So proper military authority might have had power to requisition the rooms for such purposes as might have [been] demanded by the necessities of war. However, it is clear from the evidence in the case that the rooms were not required for any such purpose at all.

"For the above reasons we are of the opinion that the trial Court was right in holding (1) that there was no lawful requisitioning of the premises by the Japanese and (2) that the appellants must pay compensation for the use and occupation thereof."

[Report: 1949 B.L.R. 126.]

Belligerent Occupation—Respect for Private Property—Right of Occupant to Liquidate Property—Liquidation as Distinguished from Confiscation—Hague Convention No. IV—Articles 43, 46 and 48—Obligation of Occupant to Respect Local Law—Obligation to Respect Legislation of Opposing Belligerent Relating to Trading with the Enemy—Regulation of Currency and Banking.

See p. 687 (*Public Trustee* v. *Chartered Bank of India, Australia and China*).

Belligerent Occupation—The Public Property of the Enemy State —Proceeds of Lighthouse Dues Collected by Concessionaires—Whether Public Enemy Property—Article 53 of Hague Regulations, 1907—Whether Part Due to Occupied State is *Valeurs exigibles*—Relevance of Fact that State's Part Not Ascertained—Relevance of Fact that State's Part Previously Pledged to Creditors.

See p. 806 (*Lighthouses Arbitration between France and Greece—Claim No.* 8 (*First Part*)).

C—WARFARE AT SEA

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Warfare at Sea—Measures and Instruments of Force—Warship—Definition of—Whether Requisitioned Vessels Can be Warships.

See pp. 801 and 341 (*Lighthouses Arbitration between France and Greece—Claim No.* 1 (*First Part*) and *Claim No.* 1 (*Second Part*), respectively).

Warfare at Sea—Measures and Instruments of Force—Conversion of Merchantmen—Requisitioned Vessels.

See p. 341 (*Lighthouses Arbitration between France and Greece—Claim No.* 1 (*Second Part*)).

G—NEUTRALITY

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See p. 609 (*Stepczynski* v. *Secretary-General of the United Nations*).

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